United States District Court

Southern District of California

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.) Case No. 14-CR-3571 LAB
) Motion Hearing/Bench Trial
) Case No. 11-CR-1302 LAB
PAULINO HERRERA-HERNANDEZ,) OSC-Supervised Release
)
Defendant.)
______________________________) Tuesday, March 24, 2015

Before the Honorable Larry A. Burns
United States District Judge

Appearances:

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(Defendant is being assisted by Mixteco and Spanish interpreters.)

THE CLERK: Calling number 2 on the calendar, 14-CR-3571, United States of America versus Paulino Herrera-Hernandez. Counsel could state their appearance, please.

MS. JINDAL: Good morning, your Honor. Amrutha Jindal, Federal Defenders, on behalf of Mr. Herrera-Hernandez.

THE COURT: All right.

MR. KATZ: And good morning, your Honor. Benjamin Katz on behalf of the United States.

THE COURT: Good morning. Please be seated. I apologize for being late this morning, 15 minutes late. Not going to fine myself like one of the our judges did, but this was on me, and I apologize for keeping everybody waiting.

This matter is on today -- pardon me -- for a motion hearing on the 1326 (d) motion filed by the defendant. If that motion is not granted, then my understanding is the defendant is prepared to submit his case on stipulated facts. And I have been presented with a document that purports to be a stipulation of facts agreed to by the parties. Is that your understanding, Mr. Katz, and yours, Ms. Jindal?

MR. KATZ: Yes, your Honor.

MS. JINDAL: Yes, your Honor.

THE COURT: All right. The gist of the 1326 (d) motion is that defendant, who speaks Mixteco, did not understand the proceedings during his deportation hearing. That's essentially it, isn't it, Ms. Jindal?

MS. JINDAL: Yes, your Honor.

THE COURT: And I understand the government intends to present evidence in connection with the 1326 (d) motion; is that right, Mr. Katz?

MR. KATZ: Yes, your Honor, we're prepared to do that, evidence on that point.

THE COURT: All right. You may call your witnesses or present whatever evidence you have on the motion.

MS. JINDAL: Your Honor, if I may, I would -- I guess I would make two notes with regard to the evidentiary hearing just before we get started. The first is that I think based on what's submitted in the papers, I don't know that an evidentiary hearing is necessary; I don't think that it is because the government hasn't put forth any facts regarding Mr. Herrera-Hernandez's 2009 expedited removal. That's one of the removals we're challenging, and, as your Honor recalls, that's the removal that was later reinstated in 2011.

THE COURT: Right.

MS. JINDAL: They haven't put forward any evidence regarding what happened in that removal proceeding, so I think the Court can rule on the motion with regards to this due process issue just on the papers itself.

THE COURT: Can you -- Ms. Jindal, can you summarize for me the background with respect to immigration proceedings affecting Mr. Herrera; how many times has he been in immigration proceedings?

MS. JINDAL: Your Honor, he's had three removals. The first was in June of 2008; that was an expedited removal. The second was February of 2009; that was also an expedited removal. And the third was in May of 2011, which was a reinstatement of the February 2009 removal.

THE COURT: Okay. The first two were expedited removals in their own right, stand-alone expedited removals, not reinstatements?

MS. JINDAL: Correct. So only the third was a reinstatement, and in my (d) motion, I challenge both the 2008 and the 2009 removal. Now, in order for the government to prove that he has a SOC, a specific offense characteristic, that results in a four-level increase based on his 2011 1326 conviction, they would have to prove that the 2009 removal was correct.

MR. KATZ: Your Honor, the attack on that removal is that he didn't speak Spanish. If we can establish that he spoke Spanish in 2008 and he speaks Spanish as of his arrest in 2014, it's --

THE COURT: You mean as opposed to the Mixteco dialect?

MR. KATZ: Your Honor, we don't dispute that he speaks Mixteco as well. Our argument is that he speaks sufficient Spanish to meet the requirement of due process. As far as this 2009 removal, your Honor, proving that he spoke Spanish in 2008 and he spoke Spanish in 2014, it is certainly enough for the Court to conclude that a few months later, he still spoke Spanish.

THE COURT: So the evidence I assume would be people who had interacted with him before the date of the 2009 removal who would say we conversed with him in Spanish and he understood what was going on, was able to communicate with us?

MR. KATZ: Yes, your Honor. Officer Lopez is here to -- is the one who conducted his 2008 removal.

THE COURT: That seems competent evidence to me, Ms. Jindal. I mean you can certainly cross-examine him about the extent of their conversation, but yeah, you know, I spoke English yesterday, and when I walked in today, I'm still speaking it and understanding it. So I understand the government's theory here.

MS. JINDAL: Given that, your Honor, I do think that any evidence from his most recent arrest in 2014 would not be relevant to the deportation issue because --

THE COURT: No, the --

MS. JINDAL: -- the deportation issue is what happened in 2008 and 2009, and what happened six or -- five or six years later now doesn't seem relevant to what language he spoke back then.

THE COURT: Well, it could or could not be. I mean look, the relevancy bar is very low, as you know, I mean anything that has a tendency in reason to prove a material fact. If -- do you have evidence about his current command of the Spanish language?

MR. KATZ: Yes, your Honor. We have the post-arrest video where he converses with Agent Barba, who's also here.

THE COURT: Yeah, I -- look, it's not as relevant as showing that he spoke Spanish sometime before, but that he's very conversant in Spanish some six years later, you know, there's two inferences, either that he learned it in the meantime or that he knew it all along and he's always been speaking Spanish, and, you know, it's some -- some evidence of both, so I don't think it's -- I don't think it's not relevant.

MR. KATZ: I'd also --

THE COURT: I agree with you, Ms. Jindal, that it has less relevance than showing that he was competent and conversant in Spanish before the time of the challenged deportation. But that he speaks it real well afterwards? I'll let them put that on if that's the evidence that they have.

MR. KATZ: And --

THE COURT: I don't see any probative danger to it. It's not going to take very long to put that on. You've already got that on a video presentation?

MR. KATZ: Yes, your Honor. And I'd just point out that the reason that we do think it's relevant here as opposed to suggesting that he learned Spanish in the meantime is his own declaration; in paragraph 6 the defendant says that the little Spanish I know is what I picked up from hearing others speak it while working in the tomato fields in Mexico from 2005 to 2008.

THE COURT: All right. You know, look, I do not have a view that he's foreclosed from bringing this action, but the other curious aspect of this to anybody watching it is that this fellow was in front of me. Now, he had a Mixteco interpreter when he was in front of me last time, but the point was I don't think in the last case there was any challenge to the 2009 deportation, right?

MS. JINDAL: I was not the attorney on that case nor was Federal Defenders, so --

THE COURT: So no, I'm not pointing fingers at anybody, I'm just --

MS. JINDAL: Okay, but -- I don't believe there was, but the Ninth Circuit decision in Raya-Vaca only occurred earlier this year, or last year, rather, in 2014, so that very pivotal case didn't exist at the time of his 2011 deportation.

THE COURT: Well, yeah, okay. So that's another reason. It just strikes me curious that someone can plead guilty, admit an element in an earlier case, the element of deportation, and then say oh, you know, in a later case I wasn't fairly deported. I mean that, it would seem to me and logically suggest to me, even though I know the case law is otherwise, that you'd be foreclosed from doing that; you made an admission, you're sort of stuck with this admission. If you want to fight the deportation, then fight it, but once that's settled, it's settled. But as I said, I understand that that's not the law, and I'm not proceeding on that basis. The government has to face the challenge that's been brought in this case and is prepared to. So with those things said, Mr. Katz, you may call your witnesses.

MR. KATZ: Yes, your Honor. The government calls Officer Rodrigo Lopez. Your Honor, while Officer Lopez approaches, I'll point out a mistake that I made in the filing. So this -- our initial filing of our response in opposition was struck because of the timeliness issue that we resolved two weeks ago when I submitted for the second time. When I resubmitted the document, I submitted an unsigned -- the unsigned version of Officer Lopez's -- it was correct in the first filing. I have a signed copy here. It was signed on March 3, 2015. It's the same --

THE COURT: All right. You may file the signed copy. Tish, if you'll swear Officer Lopez.

THE CLERK: Please raise your right hand. Do you solemnly swear the evidence you shall give in the cause now before the Court will be the truth, so help you God?

THE WITNESS: Yes.

THE CLERK: Will you please state your first and last name.

THE WITNESS: First name Rodrigo, last name Lopez.

THE COURT: All right. You need to pull the mic up and project your voice a little bit louder; you're not speaking loud enough. Go ahead, Mr. Katz.

Rodrigo Lopez

was called by the government and testified as follows:

Direct Examination

BY MR. KATZ: Q. Good morning, Officer Lopez.

A. Good morning.

Q. How long have you been a CBP officer?

A. Since February 2004.

Q. And what is your Spanish language background?

A. My parents both spoke Spanish, and I grew up speaking Spanish. I went to school in the United States though, so I speak both languages.
Q. And you continue to use Spanish today?
A. Yes.
Q. How do you use it?
A. Daily basis, talking to people who are coming from Mexico into the United States.
Q. Now, you say talking to people coming to the United States --
A. At work, yeah.
Q. -- from Mexico. Do part of your duties involve taking sworn statements and performing expedited removals of aliens who've entered illegally?
A. Yes, they did when I was working there in that unit. I haven't worked in that unit since 2011 --
Q. Okay.
A. -- but I was -- I did a lot of expedited removals while I was there.
Q. So in 2008 that was part of your duties?
A. Yes.
Q. Now, can you describe at that time in 2008 what your process was for taking a sworn statement from an alien who had -- was to be removed via expedited removal.
A. They would sit in front of us. We'd read the -- we'd

read an explanation of the -- what the interview was all about, what was about to take place, we'd have them raise their right hand and, you know, ask them if they swear to tell the whole truth, and, you know, ask a series of basic questions like biographical questions, name, date of birth, country of citizenship, their reasons for entering, everything like that.
Q. And what language would you speak to an alien in?
A. Depends on what they were -- where they were from.
Q. I imagine that the majority of the time it was Spanish.
A. Yes, it was.
Q. Were there times when aliens entering even from Mexico did not speak Spanish?
A. There was, yeah, there was a few times.
Q. And what was the process then?
A. We'd either call the telephonic interpreter; we had a agency. There were a few times where if we couldn't get an interpreter there, usually they're traveling with someone who also spoke the language and spoke Spanish, so we'd use them if we wouldn't get one on the telephone.
Q. And how, if at all, would you memorialize -- would you record what language an interview was conducted in?
A. For the telephonic interpreter, they were assigned a number, so we'd write the number of that interpreter there, and we'd put in the I-867 what language was -- the interview

was conducted in.
Q. And so you mentioned the I-867; take us through what you would memorialize on that form.
A. The type of language that was used, who the interpreter was or their assigned number.
Q. And did you have to -- you had to personally enter the language that was used after you conducted the interview?
A. Yes.
Q. And then you would record what you spoke about in the interview in the body of that form?
A. Right, correct.
Q. And would the alien sign it?
A. Yes.
Q. And initial each page?
A. Yes.
Q. And when would that take place?
A. After the interview was complete.
Q. So after the interview was complete, you would type up that 867, present it to the alien. Would you read it back to them --
A. Yes.
Q. -- as you'd written it?
A. Yes.
Q. And then you'd have them sign and initial it?
A. Yes.

Q. Approximately how many times -- well, let's back up. How long did you work in that role?
A. About four years.
Q. And in those approximately four years, how many times did you require the assistance of the interpreter line that you mentioned?
A. Oh, I'd say 50, around there, maybe.
THE COURT: How many?
THE WITNESS: Fifty maybe.
BY MR. KATZ: Q. And do you recall, were any of those 50 times for the Mixteco dialect?
A. I recall a couple for dialects from people from Mexico, but I can't say for sure if it was Mixteco or not.
Q. I'd ask you now -- so you have a binder in front of you there.
A. Yes.
Q. And if you could turn to what's marked as Exhibit 14 in that binder. It's at the very back, and -- I think one page before that. It will have a yellow sticker on there. Do you recognize that?
A. Yes.
Q. What is it?
A. This is the I-867.
(Exhibit No. 14 identified.)
Q. For who does it relate to?

A. Paulino Herrera-Hernandez.
Q. And what's the date?
A. It is June 24, 2008.
Q. And this is the same I-867 that you reviewed in connection with submitting your -- your affidavit in this case, correct?
A. Yes.
Q. And what language is indicated on that form?
A. Spanish.
Q. Now, this was almost seven years ago now. Do you remember Mr. Herrera-Hernandez personally?
A. No.
Q. But given what you've told us about your practices, can you conclude what language that interview took place in?
A. Yes.
Q. What language was that?
A. Spanish.
Q. And I see answers in there on some of the basic information that you mentioned, his name, his citizenship, things of that nature. How did all those answers get into the 867?
A. Oh, I asked and I got an answer.
Q. So it's not your practice I assume to put in those answers based on other sources of information?
A. No.

Q. So those answers are the answers you're given by the alien?
A. Correct.
Q. Isn't it -- if an alien at the beginning of your interview said to you I don't understand Spanish, I want Mixteco, if he said that to you in Spanish, what would you have done?
A. I would have contacted an interpreter.
Q. And furthermore, if during the course of your interview, given your Spanish language background, if it was clear that the defendant didn't understand you, that he spoke a different dialect or different language, would you have continued the interview without an interpreter?
A. No.
Q. What would you have done?
A. Contacted an interpreter.
Q. And so based on all this, your practice and what you see from that form there, what conclusion, if any, can you reach about whether the defendant spoke Spanish sufficient to comprehend your questions and give you answers on that day?
MS. JINDAL: Objection, your Honor. This question -- this witness is not qualified as an expert, and that question is asking about whether he -- how he understood my client's ability to understand Spanish, which I think would require expert testimony.

THE COURT: The gist of the question is asking him what his habit and custom is in these circumstances?

MR. KATZ: To conclude based on his habit and custom and his own document whether --

THE COURT: Reframe the question --

MR. KATZ: Sure.

THE COURT: -- Mr. Katz.

BY MR. KATZ: Q. Given what you've -- what we've talked about on that form, do you believe that -- and your -- excuse me. Given what we talked about on that form and your practice as you've described it, do you believe that the defendant answered your questions in Spanish?

A. Yes.

Q. And do you believe that he understood your questions in Spanish so as to answer them?

MS. JINDAL: Objection again, your Honor; same reasons, calls for expert testimony.

THE COURT: No, overruled. You may answer. The question to you is concentrating on the form -- understanding that you don't recall the interaction with Mr. Herrera from personal knowledge -- looking at the form, do you believe that you conversed in Spanish with him and communicated required warnings and information that you had to communicate?

THE WITNESS: I do, yes.

MR. KATZ: I have nothing further, your Honor.
THE COURT: You may cross-examine.

Cross-Examination

BY MS. JINDAL: Q. Good morning.
A. Morning.
Q. You were only present during the expedited removal in 2008 for Mr. Herrera-Hernandez, correct?
A. Correct.
Q. You did not -- you were not present for the expedited removal in 2009 for Mr. Herrera?
A. No.
Q. And you said that you don't specifically remember the actual proceeding with Mr. Herrera?
A. No.
Q. But you reviewed your record of sworn statement?
A. Yes.
Q. Let me ask you a few questions about that. I think you said in your direct testimony that the record of sworn statement -- I'm sorry -- you said in your affidavit that the record of sworn statement memorializes the statements made by Mr. Herrera; is that right?
A. Correct.
Q. At the time that you're interviewing Mr. Herrera, you're taking -- are you taking handwritten notes?
A. No, I'm typing. Usually we're -- I have the computer in

front of me with a keyboard and --
Q. So you're taking --
A. -- the questions are written in advance, and then as he answers, I'll type up the response.
Q. Okay. And was that proceeding recorded?
A. No.
Q. So there's no video or audio recording of what you did in 2008?
A. No.
Q. Now, you said that you're typing the answers into the form. What you're typing in is basically a summary of his response, right?
A. Sometimes, yes.
Q. You're not typing a verbatim, you know, word-for-word transcript of what he said?
A. Depends on how long the answer is.
Q. Okay. So let me give you an example. If -- if you asked Mr. Herrera "What is your true and correct name?" and he responded "Paulino," and you followed up with "What is your last name?" and he responded "Herrera-Hernandez," that level of detail, the back and forth, would probably not be included in the record of sworn statement, right? It would probably --
A. Like if I asked "What's your last name?" and then "What's your middle name?" and "Do you have...," no, not always, no.

Q. You would just write his full name in response to the question of "What is your name?"
A. Yeah. I usually asked "What is your full name?" is what I usually ask.
Q. And if a person -- if a person provided you with -- so if somebody asks you to repeat a question or somebody paused for a long time before answering the question, scratched their head, looked confused, that type of information wouldn't be reflected in the record of sworn statement, right? It's just the words that are in the record of sworn statement?
A. Something minor like that would not, no.
Q. You also said that, looking at that document, exhibit -- Government Exhibit 14, that you included the language that was included -- that was being spoken at the top of the document; is that right?
A. Yes.
Q. And tell me why that's important.
A. So that it's clear that the person understood what was being said to them and they understood the nature of the proceedings.
Q. So the only reason why you know that this happened in Spanish is because that word, "Spanish," is included in the language column there on the form?
A. Yes.
Q. Otherwise it could have happened in English?

A. I would have -- I would put English if we did it in English. I mean I've had people who spoke English who -- from Mexico, and I've written "English" on the --
Q. And the practice of including the language in that line on the form, is that something that you're trained to do by Customs and Border Protection?
A. That's something that is pretty much mandatory that you need to put there, yeah.
MS. JINDAL: No further questions.
THE COURT: Agent Lopez, I have some questions for you.

Examination

BY THE COURT: Q. This interview with Mr. Herrera took place in June of 2008, and you know that now having refreshed your memory by looking at this form, the I-867A; is that right?
A. Correct.
Q. Keep your voice up. How -- how many years before 2008 had you been a Border Patrol agent or Homeland Security agent?
A. Four.
Q. Okay. And do you -- can you give me a ballpark of how many of these types of interviews you'd done in the four years prior to June of 2008.
A. Prior to 2008?

Q. Yeah, just a ballpark. I wouldn't expect you to know an exact number. Was it dozens or hundreds or --
A. It's probably over a hundred.
Q. Okay. You mentioned that you think on possibly about 50 occasions you've called the interpreter number because the person didn't either speak English or Spanish --
A. Or another language.
Q. Or another language.
A. We have had a lot of people from Africa and Haiti and --
Q. Okay. Have you ever dealt with someone who maintained his first language was Mixteco? Have you ever had one of those?
A. That I can't recall. I know I've spoken to people who spoke Mexican dialect, but there's more than -- there's Zapotec, there's Mayan, there's different dialects.
Q. Okay. Are you under -- are you in any type of rush when you do these things or do you have the time to go through and make sure the person that you're interviewing understands all the questions and is answering responsively?
A. There were times when they'd assign us a lot of ERs.
Q. Okay. I mean I want to know what your practice is. Do you ever take shortcuts? Would you ever fill one of these out, for example, these I-867As, and say that a person was, you know, waiving, giving up rights if you weren't convinced that that was the case? Did you ever do that?

A. No, no.
Q. Okay. Here on this one that's marked as Government's Exhibit 14, it appears that -- that at the bottom and continuing on to the second page that you asked specific questions, then you show answers were given to those questions; do you see that?
A. Where at?
Q. It starts at the bottom of the first page of Exhibit 14, which is the I-867A dated June 24, 2008. It's the one that Mr. Katz called your attention to I think.
MR. KATZ: Yes.
BY THE COURT: Q. And it goes on to the second page and a third page. It's a question-and-answer dialog that's recorded there; do you see that?
A. Yes.
Q. Would you ever put in like that a person answered "Yes" if you weren't absolutely convinced that the person was giving you an affirmative answer to your question?
A. No, no.
Q. Would you ever purport to put in a response from a person if it wasn't absolutely clear to you that the person understood the question you were putting to him or her?
A. I would never do that, no.
Q. Okay. You understand the implications of making sure the process is followed? Do you understand why that's important?

A. Yes, yes.
Q. Do you understand that aliens have due process rights and some of them may be able to gain relief from deportation, they may be eligible for voluntary return that wouldn't have collateral consequences that a deportation would have? Do you understand that?
A. Yes, I do.
Q. Was that part of your training before June of 2008?
A. Yes, that is something we --
Q. Did your training emphasize that it was important to be precise and to make sure the person you were conversing with understood you?
A. Yes.
Q. Okay. So I asked you about taking shortcuts, and you said well, sometimes we get a lot of people. I mean the fact that you may be busy or may have a lot on your plate or a number of people waiting to be interviewed, would that ever lead you to take a shortcut and write "No" when the person said "Yes" or write "No" when the person didn't understand you? Would you ever do that?
A. No.
Q. Okay. So on this form then respecting Mr. Herrera-Hernandez, I'm assuming you stand by the answers that you typed in, that knowing your habit and custom, these are answers that Mr. Herrera-Hernandez gave to you at the

time?
A. Yes.
Q. Okay. And can I -- from you, can you assure me that not only is the answer correct, that he said that, but before you recorded it, you were sure that he understood the call of the question, what you were asking him; can you assure me of that?
A. Yes.
Q. Is that your habit and custom too?
A. Yes.
Q. Now, you're typing into a computer. Is it a divided-attention task where you're also looking at the person who's being interviewed during the process of recording the information?
A. Yes. They're usually sitting right across from me.
Q. So when you put the question to them, are you typically looking at the person in the face?
A. Yes.
Q. Then they'll give an answer, and you'll record the answer by typing it?
A. Correct.
Q. And then look back up before asking the next question?
A. Yes.
Q. If you -- if you see an expression on somebody's face that evinces to you that the person doesn't understand or

maybe hasn't gotten the call of the question, what's your procedure?
A. I'll ask them if they understand. I'll repeat the question if they don't. Then I'll ask if they need to speak in another language, if they need me to ask the questions in a different language.
Q. Okay. Have you ever had an occasion where in the midst of an interview, you've had to stop and call the interpreter line?
A. Yes.
Q. Okay. And have you done that --
A. Yes.
Q. -- when there's -- and what reason did you do that?
A. I had -- I remember -- I can recall -- because I've had several people from either Haiti or the Middle East, who said they spoke English and we started off the interview in English --
Q. Right.
A. -- but then during the -- during the course of the interview, it was apparent that they really weren't that fluent in English --
Q. Right.
A. -- so I just called an interpreter.
Q. So did they ask you to call the interpreter or did you decide that's what you needed to do based on the procedures

that you -- there wasn't good communication between you in English, you thought it best to have an interpreter in their native language, is that a decision you made or did they ask for it?
A. It was a decision I made.
Q. Okay. And was that based on the interaction, looking at a person in the face as you went along through the interview?
A. Yes.
Q. Have you ever not done that? Have you ever kind of let one slip through when you weren't sure that the person was completely understanding everything?
A. No.
Q. Would you ever do that?
A. No.
Q. Okay. When you look at this and the series of questions and answers, are you confident that in this case -- even though you don't remember the details but based on your habit and custom and looking at the recording of answers here, are you confident that there was understanding communications between you and the person who's the subject of this I-867A?
A. Yes.
Q. All right. Would you ever process someone for expedited removal if you had any questions about whether they understood the process or the questions that you were putting to them?

A. No.

Q. All right. You would kind of "stop the presses" at that point and make sure the person understood; is that what you're saying?

A. Yes.

THE COURT: Okay. Any other questions based on the Court's questions?

MR. KATZ: I just have one question based on defense counsel's question --

THE COURT: Sure.

Redirect Examination

BY MR. KATZ: Q. -- which is you talked about how sometimes if there's a long answer or a follow-up question is needed, you'll put in a non-verbatim answer in here, you'll put what the answer you got to eventually was; is that correct?

A. Correct.

Q. But you read back the full statement to an alien in their native language before they sign it at the conclusion, correct?

A. Yes.

Q. So the alien is given the opportunity to see your -- the response that you put in for them?

A. Yes.

Q. And have you ever had occasion where upon reviewing that,

an alien has corrected the answer that you took down?
A. I'm sure that that's happened probably, yeah.
Q. And if they did, would you then update the 867 to correct the mistake that they raised?
A. Yes.
MR. KATZ: Nothing further, your Honor.
MS. JINDAL: Your Honor, a few questions.

Recross-Examination

BY MS. JINDAL: Q. With regards to the correction, would that be visible on the final record of sworn statement or is that something you delete and edit on the computer?
A. I'd probably delete and just write the correct response.
Q. Okay. And when you first interview a person, do you ask them if they would prefer to proceed in English or Spanish?
A. Yes.
Q. And those are the two options you give them because those are the two languages that you speak, right?
A. Yes.
Q. And you're familiar with the Mixteco language; you know it exists?
A. I've heard of it, yes.
Q. I mean you don't understand it, right?
A. No.
Q. And you don't speak it?
A. No.

Q. And you didn't -- you don't give an individual -- you don't ask them if they would prefer to go forward in Mixteco?
A. Unless -- if they say they speak it, yeah, I'll ask "Would you prefer that language?"
MS. JINDAL: No further questions of the witness.

Examination

BY THE COURT: Q. If -- you say you don't speak or understand the Mixteco dialect yourself?
A. Correct, yes.
Q. If you -- and this is asking you to give me an opinion of what you would do based on your habit and custom -- but if you found that there was a communication barrier between you and a person who spoke Mixteco such that you weren't even convinced that the person understood Spanish, would you call the interpreter line at that point given that circumstance? Is that one of the times you would do that?
A. Yes.
Q. You wouldn't proceed and try the force the interview in Spanish?
A. No.
THE COURT: Any other questions?
MR. KATZ: No, your Honor. Thank you.
MS. JINDAL: No, your Honor.
THE COURT: All right. Thank you. You may stand down. Any other evidence at this time?

MR. KATZ: Yes, your Honor. The government calls Officer Barba to the stand.

THE CLERK: Please raise your right hand. Do you solemnly swear the evidence you shall give in the cause now before the Court will be the truth, so help you God?

THE WITNESS: Yes.

Araceli Barba De La Cruz

was called by the government and testified as follows:

THE CLERK: State and spell your first and last name for the record.

THE WITNESS: Araceli, A-r-a-c-e-l-i, Barba De La Cruz, B a r b a space D-e space L-a -- De La Cruz.

Direct Examination

BY MR. KATZ: Q. Agent Barba, what do you do for work?
A. I'm a Border Patrol agent.
Q. And how long have you been with the Border Patrol?
A. Since June of 2002.
Q. What is your Spanish language background?
A. It was my first language.
Q. Do you still regularly use Spanish?
A. Yes.
Q. In what contexts?
A. Whenever I speak to my mom, whenever I speak to family, at home with my son, at work when I interview -- when I

conduct interviews, over the phone, a lot of times even with friends or co-workers who speak Spanish.
Q. Were you working as a Border Patrol agent on the night of November -- or the morning, excuse me -- the November -- morning of November 15, 2014?
A. Yes.
Q. And what were your duties on that night?
A. I was assigned to ASID, Alien Smuggling Identification and Deterrence.
Q. And did you have reason to come into contact with an individual named Paulino Herrera-Hernandez on that morning?
A. Yes, I did.
Q. I'm sorry?
A. Yes, I did.
Q. And in what context?
A. I was requested to interview him.
Q. And interviews like this, is this a regular part of your duties as a Border Patrol agent?
A. Yes, it is.
Q. In your career, if you had to estimate how many such interviews you've conducted, what would you estimate?
A. Hundreds.
Q. Did you ask the defendant whether he wanted to proceed in English or Spanish?
A. I did.

Q. And what did he say?
A. Spanish.
Q. Did you then proceed to interview him regarding his citizenship?
A. I did.
Q. Regarding the circumstances of his entering the United States?
A. Yes.
Q. Regarding his parents' citizenship?
A. Yes.
Q. Regarding whether he had immigration documents?
A. I did.
Q. Was he able to answer all of your questions?
A. Yes.
Q. Have you reviewed -- excuse me. Was that interview video recorded?
A. It was.
Q. And have you reviewed that video recording since the morning of November 15, 2014?
A. Yes, I have.
Q. Is it a fair and accurate representation of the interview that took place?
A. Yes, it is.
MR. KATZ: Your Honor, at this time I'd --
THE COURT: All right. The Court augments its

ruling on the objection, having refreshed my memory of Mr. Herrera-Hernandez's declaration also. I find that the offer of proof respecting the video and the defendant's understanding of the Spanish language -- not Mixteco dialect but the Spanish language -- is a relevant fact. At page 2 he says, at paragraph 4 "I speak Mixteco. It's the only language that I understand completely and speak fluently." He's speaking in the here and now, at least according to the declaration. It goes on at paragraph 5 by saying "I understand and speak very little Spanish." Next page, paragraph 6: "The little Spanish I know is what I picked up from hearing others while working in the tomato fields of Mexico between 2005 and 2008."

So the defendant has proffered, at least according to the declaration, as I understand a fair reading of it, is that he still doesn't understand Spanish. He's speaking in current. He's not saying in 2008 I didn't understand Spanish, I do now; he's saying I still don't understand it, Mixteco is my first language.

So, again, this is to augment the ruling I made earlier on the relevancy of his command of the Spanish language in 2015. If he speaks it now and the video shows that or shows no lack of understanding of an interview conducted in Spanish, it would contradict what he's put in his declaration. So with that said, you may play the video.

BY MR. KATZ: Q. Agent Barba, you can see the video on the screen in front of you.

(The video recording was played.)

BY MR. KATZ: Q. Let the record reflect that as the video that we just watched was playing, a translation was synced and displayed below; is that correct, Agent Barba?

A. Yes.

Q. And I notice in there a few things I'd like to talk to you about. You -- after you read the defendant his rights, you asked him to come closer, to walk towards you to sign the form regarding his rights; is that correct?

A. Yes.

Q. You instructed him first to come closer?

A. Yes.

Q. What did he do in response to that instruction?

A. He moved closer.

Q. And you told him that you needed him to sign a form and to initial it in a few other places; is that correct?

A. That's correct.

Q. You didn't define for him what the word "initial" meant?

A. No.

Q. And did he in fact sign and initial that form?

A. He did.

MR. KATZ: Let the record reflect I'm now showing what has now been marked as Government Exhibit 15 to defense counsel. Your Honor, may I approach?

THE COURT: Sure.

BY MR. KATZ: Q. Do you recognize that form, Agent Barba?

A. I do.

Q. And what is it?

A. That's what we call the 214.

(Exhibit No. 15 identified.)

Q. And is that the form that you requested the defendant to initial and sign?

A. Yes, it is.

Q. And in the spots where it says to initial, are the defendant's initials present?

A. Yes.

Q. And in the place where his signature is required, is his signature present?

A. Yes, it is.

THE COURT: I don't think I have Exhibit 15.

MR. KATZ: Yes, your Honor. I just pulled it and added it.

THE COURT: Okay.

MR. KATZ: So I submit that now.

BY MR. KATZ: Q. So now having reviewed the video and based on your recollection, were you able to converse with the defendant in Spanish?

A. Yes, I was.
Q. Did you believe that an interpreter was necessary for the defendant to comprehend what was taking place?
A. No.
Q. Did the defendant at any time tell you that he needed the assistance of a Mixteco interpreter?
A. No.
Q. Did he tell you that he didn't understand Spanish?
A. No.
MR. KATZ: Your Honor, that's all I have at this time.
THE COURT: All right. Cross-examination?

Cross-Examination

BY MS. JINDAL: Q. Agent Barba, at the start of the interview, you gave Mr. Herrera-Hernandez two options for languages, Spanish or English, right?
A. That's correct.
Q. You didn't ask him what language he spoke?
A. I did not.
Q. And you explained to him your rights, which we just saw in the video, correct?
A. Correct.
Q. And that's something that you do to every individual that you interview?
A. If we're contemplating a criminal prosecution, yes.

Q. And this video was recorded because you were contemplating a criminal prosecution, right?
A. All of our interview rooms (sic) at our station are recorded.
Q. Okay. And after you read him his rights, you asked him if he understood his rights, and Mr. Herrera-Hernandez said "No."
A. That is correct.
Q. And then you asked him again, "You don't understand your rights?" and he said "No."
A. That's correct.
Q. And then you had to go through reach right individually, right?
A. That's right.
Q. Another question that you asked him is what country he's a citizen of, correct?
A. Correct.
Q. And his response was "Prieto" --
A. Okay.
Q. -- is that correct? Do you remember?
A. I know there was a couple where he said Prieto, but I'm not sure if he was saying Oaxaca or Prieto. I noticed some of them weren't properly translated in the transcript, some of the stuff, minor stuff, but overall it was.
Q. So when you asked what country are you a citizen of, he

didn't respond I'm a citizen of Mexico?
A. Correct.
Q. He's -- based on the video, it appeared that he said "Prieto"?
A. I would have to listen to it.
Q. Okay. Would it be helpful for me to show you the transcript?
A. No, the video, because the transcript, like I said, there's parts that are not exact, and I noticed that in reviewing the transcript.
Q. Okay.
A. It would help if I would watch the video in that specific part.
Q. Well, we could play it back for you if that would be helpful. I know that it would be kind of time-consuming, but --
A. That would --

THE COURT: Yeah. Is the gist of your -- I think the question Ms. Jindal's putting to you is you asked him of what country are you a citizen, and he -- as I recall the video, he answered by stating his province or his state where he was from.

THE WITNESS: Right.

THE COURT: And then you followed up, and he finally came around and said "Mexico" when you said "country." Is that the way it went down?

THE WITNESS: Pretty much.

THE COURT: You asked him about where his parents were from --

THE WITNESS: Correct.

THE COURT: -- and he gave the state or the province --

THE WITNESS: Correct.

THE COURT: -- and then you asked him what country, and he came around to saying "Mexico" eventually?

THE WITNESS: Right. I don't think he said Mexico. I may have asked him are you Mexican or are they from Mexico.

THE COURT: Okay.

BY MS. JINDAL: Q. So you would agree that you had to ask him repeated times what country are you a citizen of? He didn't answer Mexico in response to your initial question?

A. That's correct. Can I say something?

Q. Well, let me keep asking the questions.

A. Okay.

Q. It appeared that you asked him -- after he said "Prieto" or the local province or whatever it was a few times, that you ended up asking him if he's Mexican, and his response was "Yes, Mixteco." Is that right?

A. I believe so.

Q. And you're aware that Mixteco is a language that is

spoken in certain provinces in Mexico, right?
A. It's also considered a region in Mexico, not just a language.
Q. But you're aware that the language of Mixteco exists?
A. Yes.
Q. And you're aware that people from the state of Guerrero speak Mixteco?
A. Like I said, it's not just Guerrero, it's a region. I believe it connects part of Veracruz, part of Oaxaca, and part of Guerrero.

THE COURT: Ms. Jindal, clarify for me. I thought he said "Mixtec," without the "o" on it when he was asked about that. Was it Mixtec or Mixteco? I thought that he was asked and he said "Mixtec."

MS. JINDAL: I think that -- let's see the transcript I have. So in the transcript provided by the U.S. Attorney's office and what was included in the video here, it was "Mixtec." However, I think what your Honor may be thinking about was the record of sworn statement --

THE COURT: No, I'm thinking about this. That's what -- you said "Mixteco," and I thought he said "Mixtec" when he was asked about -- as to that. Is it -- no "o" on it in the interview, correct?

MS. JINDAL: I think it -- I think there was an "o," but I would probably need to rewatch it. I don't know that that really makes much of a difference, your Honor, because my understanding is that Mixtec and Mixteco are the same thing.

THE COURT: Okay.

MS. JINDAL: They both refer to the language and the people.

THE WITNESS: Or region.

THE COURT: Does one refer to a region?

MS. JINDAL: So my understanding is that Mixteco is -- and I'm sure our Mixteco interpreter could provide much more information than I can -- but my understanding is that Mixteco is the name of the people as well as the language. So while he says -- while he may be from Guerrero, he identifies himself as a Mixteco and the language that he speaks is Mixteco.

THE COURT: Okay. All right.

BY MS. JINDAL: Q. So at some point Mr. Herrera-Hernandez, in response to this question about citizenship, said Mixteco or even Mixtec, right?

A. Something that sounded to that effect.

Q. And you just testified that you're aware that Mixteco is an indigenous language or a dialect spoken in certain parts of Mexico?

A. Correct.

Q. And at that point when he said Mixteco, you didn't ask

him if he spoke Mixteco, right?
A. No.
Q. And you didn't seek the assistance of a Mixteco interpreter?
A. No. It was not requested.
Q. But based on the fact that he said Mixteco, you didn't follow up to see if that was the language that he spoke?
A. No.
Q. He also had some difficulty answering some of your questions, right?
A. Yes.
Q. You had to follow up --
A. I -- I don't know. I'm not truly sure if it was a not -- a lack of understanding it or just not being forthcoming.
Q. But it was clear that he wasn't answering the questions that you were asking in a way that you were able to understand?
A. Some of it he may have been mumbling or I may have interpreted it as being evasive.
Q. Now, do you understand Mixteco?
A. I do not.
Q. So it's possible that his mumbling could have been him speaking Mixteco, right?
A. It's possible.
Q. So, for example, when you ask him how he entered this

time on this occasion, his response was "at the booth", through the booth"; is that right?
A. Correct.
Q. And then you had to clarify again and you asked him "So you didn't enter through the port of entry," then he said "No," right?
A. I do that every time just to make sure that they didn't present themselves to the port of entry --
Q. Okay.
A. -- when I'm doing an interview.
Q. But you would agree that when you asked him how he entered this time, he answered included saying "at the booth," and then saying "it was through the hills," and then giving multiple responses about whether a fence existed; is that right?
A. Yes. And the booth is that -- there's a tollbooth on the -- on the road on the south side, south of the mountain range where he entered.
THE COURT: What did you understand his reference to the booth to be, a --
THE WITNESS: Landmark on the south side.
THE COURT: Okay. So an area in the hills, not a port of entry?
THE WITNESS: No, it's not a port of entry. It's the Tecate Highway actually. And there's a tollbooth between

TJ and Otay -- or between Otay and Tecate, and the aliens often use that tollbooth as a reference of where they drop off because they can see the fence.

THE COURT: But when he said "booth," you understood he was referring to that landmark in --

THE WITNESS: Absolutely.

THE COURT: -- in the hills?

THE WITNESS: Yeah, and I -- absolutely.

THE COURT: Go ahead, Ms. Jindal.

BY MS. JINDAL: Q. You also asked him at the end a question which was "Why are you afraid to return to Mexico?" and I think this may have been a situation where the translation didn't catch his response.

A. Correct.

Q. It sounded like he responded saying something about his wife and his children; is that right?

A. Correct.

Q. So in response to the question of why you're afraid to return to Mexico, Mr. Herrera-Hernandez said something about his wife and kids?

A. He said "Yes. I have a wife and kids."

Q. You also prepared a record of sworn statement in this case, correct?

A. I did.

Q. And I believe -- if you'd turn to Government Exhibit 13

in the binder. Do you recognize that as the record of sworn statement that you prepared?
A. Yes.
(Exhibit No. 13 identified.)
Q. And were you preparing this record of sworn statement simultaneously as you interviewed Mr. Herrera-Hernandez?
A. No.
Q. You were taking handwritten notes?
A. Yes.
Q. And then you later typed up the record of sworn statement based on your handwritten notes?
A. That's correct.
Q. Looking on the first page, in the middle of the first page, one of the questions that's asked or is elicited is "Of what country are you a citizen?" Correct?
A. Yes.
Q. And the answer written is "Mixteco."
A. Okay.
Q. Do you see that?
A. Yes.
Q. That was an answer you wrote, correct?
A. Correct.
Q. And underneath that it says "Are you a citizen of Mexico?"
A. Correct.

Q. And it says "Yes, Mexican"?
A. Yes.
Q. Now, we just watched the interview, right?
A. Okay.
Q. At no point in the interview did that dialog of "Are you a citizen of Mexico?" with the answer of "Yes, Mexican" take place, did it?
A. Like I said, I take handwritten notes, and it might not be an exact translation I mean like verbatim of what my notes were, what he said. I don't go back and view the video when I'm typing up my notes -- I mean when I'm typing up my sworn statement.
Q. So the sworn statement may not accurately reflect what was said in the interview because you're going off of your notes and summarizing what you believe he said?
A. I think it accurately reflects it. It might not be verbatim, but I think it does accurately reflect what took place in the interview, and --
Q. At any -- at any point in the interview did Mr. Herrera-Hernandez say yes, I'm a Mexican citizen?
A. No.
Q. And this record of sworn statement also doesn't contain his original responses to your question regarding citizenship, which were stating "Prieto" or whatever the province was that he's from, right?

A. Correct.
Q. And this record of sworn statement also doesn't reflect what we saw in the video with the brackets "U.I.," which signifies unintelligible; it doesn't reflect any of the responses that he gave that you just didn't understand, correct?
A. Correct. If I didn't understand it, I didn't put it in.
MS. JINDAL: No further questions, your Honor. Oh, actually -- sorry -- could I ask one more question?
THE COURT: Sure. Of course.
BY MS. JINDAL: Q. And regarding Government Exhibit 15, which Mr. Herrera-Hernandez -- contained Mr. Herrera-Hernandez's signature that was previously shown to you during your direct testimony --
A. Correct.
Q. -- Mr. Katz asked you if you asked Mr. Herrera-Hernandez to approach to sign, and you said that you did, and Mr. Herrera-Hernandez approached you to sign the form, right?
A. Yes.
Q. And you pointed to him where to sign, right? I think we saw that in the video.
A. Right. I read the -- there was a question, and then I pointed out the line after the question that I had asked him.
MS. JINDAL: Okay. So no further questions.
THE COURT: I have a couple questions for you.

Examination

BY THE COURT: Q. Have you ever encountered a situation before this time where you asked somebody of what country they were a citizen and then they responded by telling you what province or state they were from in Mexico?
A. Often.
Q. Is that fairly common?
A. It's common even of U.S. citizens; sometimes you ask them when you interview them, you know, what country are you a citizen, and they say California.
Q. I couldn't see you on the video. Were you attempting to write down his answers?
A. I was. I was taking notes.
Q. When you asked him questions, would you look at the defendant?
A. Yes. That's why I don't type while I'm writing it, so it's a more interactive conversation.
Q. At any point during the interview, did you think there was a failure of communication or lack of understanding on his part as to what you were asking?
A. No.
Q. You said at one point when he asked about a word or a statement was repeated several times, you thought he was being evasive?
A. Correct.

Q. Was that your impression, that he was being evasive as opposed to a lack of understanding?
A. Yes.
Q. And what did you base that impression on?
A. When -- because it was at times where I asked him, you know, how did you enter, where -- did you go over the fence, did you go around the fence, was there a fence, and then about him knowing the route into the United States and all the way to where his destination was, which was Santa Maria.
Q. Well, this interview, it looked it started about eight o'clock in the morning, something like that?
A. Correct.
Q. And did he appear tired to you during the interview?
A. Perhaps tired.
Q. Well, it appeared to me when I watched the interview that he was rubbing his face from time to time; did you see that?
A. I did.
Q. And -- I don't know what your impression was -- did you have any impression that he was fatigued or tired or he'd been up for a long time?
A. He may have been. To me, I interpreted it more as being fidgety, not real comfortable with the responses.
Q. Do you know where he had been before he was interviewed?
A. In a cell.
Q. Okay. And do you know how long?

A. I don't know. I don't recall.
Q. He said in the -- during the interview that he'd actually entered the United States three days before the interview.
A. Correct.
Q. Did that correspond with reports that you had from whoever found him?
A. I don't typically check that when I -- before I interview, but considering where he entered, it would not be uncommon.
Q. How did he come to be in the room where you interviewed him? Did you fetch him from a cell?
A. My partner, my witness, went to go get him.
Q. All right. And do you know how long he'd been in the cell? Do you know?
A. Like I said, I couldn't tell for -- I couldn't tell you for sure.
Q. Do you know --
A. Typically less than -- he'd be at a station less than six hours.
Q. Oh, at your station. So he was brought from somewhere else to the station?
A. From the field, from the mountains where he was apprehended.
Q. Okay. So let's see. If this interview began at 8:00, he would have been apprehended what, 2 a.m.?

A. Yeah. I don't know. Like I said, it was less, definitely would have been -- it would have been less than six hours but I'm not sure how much.
Q. Okay. Was he -- he was interviewed sometime during the a.m. hours, between midnight and 6 a.m. or -- I don't mean interviewed -- he was apprehended some -- to your understanding, sometime between --
A. Yes.
Q. -- noon -- or midnight and 6 a.m.?
A. Yes.
Q. Okay. And then he would have been brought to the station and put in a cell before you interviewed him?
A. Correct.
Q. Okay. And is there -- is there a bed in the cell?
A. Some of them have benches, and some of them have mats.
Q. Okay. Do you have any idea how long he'd been up before the interview?
A. I don't.
THE COURT: Any other questions based on the Court's questions?
MR. KATZ: I just have a few, your Honor, briefly.

Further Redirect Examination

BY MR. KATZ: Q. Defense counsel asked after he told you that he was Mixtec or Mixteco, why you didn't then get an interpreter or confirm that you didn't get an

interpreter -- excuse me. Why didn't you get an interpreter at that point?
A. I was talking to -- I was talking to -- I felt I was talking to him fine and he was understanding what I was saying.
Q. And his answer regarding why he was afraid to return to Mexico, that he had a wife and children, what did you interpret that to mean?
A. Not uncommon from somebody from Guerrero.
Q. And when you say it's not uncommon, what do you mean?
A. Because of the lack of work and they needed to support them; if they return to Mexico, then they're unable to support them.
Q. So your interpret -- that was your interpretation is that he --
A. Yes.
Q. -- he was afraid to return to Mexico because he needed to work in the United States?
A. He needed to financially support his family, yes.
Q. And then finally --
THE COURT: Are you interpreting that or are you saying that that's a common answer from people from that region?
THE WITNESS: That's a common answer from somebody from that region.

BY MR. KATZ: Q. And then finally, defense counsel made a point that he never expressly said to you that he was a citizen of Mexico, but in that discussion of his citizenship, you -- he stated the province he was from and then you clarified; is that correct?
A. Correct.
Q. Do you recall what you said?
A. Not the exact words.
Q. Was it something to the effect of I don't understand, so you're a Mexican?
A. Yes.
Q. And he said yes?
A. Yes.
Q. And so that's how you knew that he was a citizen of Mexico --
A. Correct.
Q. -- by asking a follow-up question?
A. That's right.

MR. KATZ: I have nothing further, your Honor.

THE COURT: Ms. Jindal?

MS. JINDAL: Thank you.

Further Recross-Examination

BY MS. JINDAL: Q. Just -- I just want to make sure that the record is really accurate with regards to this question and answer because I think it's an important one.

You asked him are you a Mexican -- "Are you Mexican," rather, and his response was "Yes, Mixteco," right?
A. Like I said, "Yes, Mixteco" -- we all heard it -- yes, Mixtec, Mixteco -- I heard "Yes, Mix" -- and then --
THE COURT: Something other than yes, Mexican, right --
THE WITNESS: Yes.
THE COURT: -- a reference to Mixtec or Mixteco? Okay.
BY MS. JINDAL: Q. And the reason why you asked this question about whether someone is afraid to return to Mexico isn't to find out why they're coming to the United States, it's to evaluate whether or not there's a potential asylum claim, right?
A. That is correct.
Q. So Mr. Herrera-Hernandez responded and said something about his wife and children, right?
A. Correct.
Q. And you didn't follow up with him to inquire what exactly he meant by that response?
A. I did not.
Q. You didn't follow up with him to see if he actually had reasons to be afraid to return to Mexico?
A. That is correct.
MS. JINDAL: No further questions.

THE COURT: All right. Thank you. You may stand down. Any other evidence, Mr. Katz?

MR. KATZ: Not at this time, your Honor.

THE COURT: Ms. Jindal, any affirmative evidence?

MS. JINDAL: No, your Honor.

THE COURT: Do you intend to call the defendant?

MS. JINDAL: I do not, your Honor.

MR. KATZ: Your Honor, I'd move to strike the defendant's declaration.

THE COURT: Well, I'm not going to strike it. Look, there's a question of fact here, and the question of fact has to do with the defendant's understanding of the Mexican language. He has made statements, but he's, you know, not going to take the stand and answer even though we have a Mixteco interpreter here; that impairs my ability to judge his credibility because some of his statements are, frankly, at odds with other evidence that I've heard. But, you know, I'll leave that to Ms. Jindal. She can call him or not call him, understanding that, you know, that's a normal consequence; the inability to judge credibility, as I've been able to do with the two agents, impairs the fact-finding process a little bit, but I can get through that.

MS. JINDAL: Your Honor, yes, at this time I would not want to call Mr. Herrera-Hernandez because I don't think that that's --

THE COURT: Okay.

MS. JINDAL: -- necessary to --

THE COURT: All right. Any affirmative evidence then?

MS. JINDAL: No, your Honor.

THE COURT: The matter is submitted?

MR. KATZ: Yes, your Honor.

MS. JINDAL: The matter is submitted. I would like a few minutes of argument on the --

THE COURT: Sure. Go ahead.

MS. JINDAL: Thank you.

THE COURT: You've relied -- let me ask you this, Ms. Jindal. You've relied in large part on Raya-Vaca?

MS. JINDAL: Correct.

THE COURT: I'm looking at page 1201. The obvious distinction between that case and this one is that the government did not contest the due process violation in Raya-Vaca. In other words, the district court assumed that Raya-Vaca's due process rights were violated, you know, based on a lack of understanding of the questions put to him, and here that's very much at issue; do you concede that? I'll read to you from page 1201. "Given the government's failure to argue that no due process violation occurred, the district court assumed that Raya-Vaca's due process rights were violated in the course of his 2011 expedited removal proceedings and looked to whether an immigration official would plausibly have exercised its discretion to grant Raya-Vaca relief in the form of withdrawal of his application for admission." So it appears to me this case really turned on the district court's determination that it was not plausible rather than a factual question of whether it was a due process violation based on lack of understanding of language.

MS. JINDAL: So in this case, in our case with Mr. Herrera-Hernandez, the government is taking the position that there was not a due process violation --

THE COURT: Right, they're contesting it, and they put on evidence which distinguishes it from that case, which just finds fault with Judge Gonzalez's -- you know, then-Judge Gonzalez's finding that there wasn't plausibility to his claims that he might have avoided deportation --

MS. JINDAL: In that --

THE COURT: -- and that's decided on a legal basis, not a factual basis.

MS. JINDAL: In that case the evidence before the Court was a declaration from the defendant --

THE COURT: But not contested.

MS. JINDAL: It doesn't appear to be contested. Now, what we have --

THE COURT: I mean it's clearly not because --

MS. JINDAL: It's clearly not, correct, but what we have here is the government putting forward evidence regarding what happened in 2008 --

THE COURT: Right.

MS. JINDAL: -- and what happened in 2014. And what I think is fatal to the government's position -- and this is something that I addressed in my reply brief, and it's not something that the government addressed in their response at all -- is that the 2009 removal, the record of sworn statement that corresponds with that doesn't list any language used in the language column. Mr. Herrera-Hernandez submitted in his declaration that he recalls both the English and Spanish languages being spoken to him at that time. Officer Lopez, who just testified, told us the importance of including the language listed -- or the language spoken in that column.

At this point the evidence before the Court is that for the 2009 removal, Mr. Herrera-Hernandez was spoken to in both English and Spanish; that's what he has said under oath in his declaration. There's no -- that's what the documents -- the documentation regarding the deportation doesn't indicate otherwise, and there's no -- been no evidence put forth by the government to counter that claim.

THE COURT: So -- but why do you focus on that when it appears he also was removed before that and that Agent

Lopez has said I spoke to him in Spanish on that occasion and he understood me and I understood him?

MS. JINDAL: So your Honor would need to rule on the validity of every deportation that --

THE COURT: Why?

MS. JINDAL: -- was challenged.

THE COURT: Because if I find one that's okay, then the 1326 (d) motion must be denied, right? It's this --

MS. JINDAL: That's -- that is true. I would request that your Honor rule on it for purposes of sentencing because, as I mentioned earlier, the enhancement only applies if the 2009 removal order is valid because that's the removal that's reinstated in 2011.

THE COURT: Okay.

MS. JINDAL: So I think that that is a pivotal or a very important distinction which is --

THE COURT: You're saying the combination of the defendant's declaration and the absence of a specification of what language was used in the 2009 paperwork raises a question about whether his due process rights were observed or not?

MS. JINDAL: I think it puts it squarely in the exact same fact context of Raya-Vaca where we have a defendant submitting a declaration and no evidence submitted by the government contesting the information in that declaration.

THE COURT: I don't know why I would get to that now before -- you know, if the motion is denied and he's found guilty, then I agree with you that if the 2009 deportation is what enhances, you know, maybe it has some relevance. I'm not positive that you can use a 1326 (d) motion and collaterally attack the fact of a deportation that's used for sentencing. I mean I know you have that right to contest it with respect to the charge itself and whether he's guilty of this offense, but usually collateral attacks on priors -- we're talking about a criminal prior -- have to be mounted first rather than at the time of the sentencing, right, so --

MS. JINDAL: That's not correct, your Honor. The Ninth Circuit in I believe the case is Rodriguez-Ocampo -- says that the only way an enhancement applies is if the actual removal order is valid --

THE COURT: Okay.

MS. JINDAL: -- so --

THE COURT: So you're saying you have the right to collaterally attack if it's used for enhancement in sentencing?

MS. JINDAL: Correct. And so your Honor is right, we can take this up at sentencing at a later time. It is just an argument that I want to raise because I do think that the Court should rule on the --

THE COURT: Is there -- is there -- is it susceptible to proof? Do we know who the agent was in 2009?

MS. JINDAL: We do. I mean this has been something that the government's been in possession of since November -- well, since 2009 but certainly since his arrest in November of 2014. And with regards to this Spanish issue going to the 2008 -- you know, this applies to the 2008 removal -- I think there's some things that came out in the evidentiary hearing that really I think emphasize the fact that Mr. Herrera-Hernandez wasn't understanding what was happening or the language being spoken to him. I think the post-arrest statement -- I've watched many of these as part of my job; I've never seen a post-arrest statement with this much clarification. Agent Barba, who testified, admitted that he was having trouble understanding the questions that were being asked.

THE COURT: Did it appear to you that Mr. Herrera was tired during that interview? I mean I watched it very carefully. He kept rubbing his face, which is something I do when I'm really tired --

MS. JINDAL: I do --

THE COURT: -- and the circumstances are that he was arrested sometime between midnight and 6 a.m., so Lord knows how long he'd been up. I don't know whether he was able to get any sleep in the cell. Maybe he was. Some of the cells, I'm told, have beds, some have just benches. But then, you know, he's hauled into this interview room at eight in the morning, and I have to tell you that as I watched his demeanor, it looked like he was tired to me, among other things.

MS. JINDAL: I can shed some light on the rubbing of the face that was happening because that was something that Mr. Herrera-Hernandez did when I first met him as well. He has a condition with his eye --

THE COURT: Oh, okay.

MS. JINDAL: -- that causes it to twitch, and so even when I first met him, was kind of rubbing his face a lot.

THE COURT: Do you know how long he'd been up before the interview?

MS. JINDAL: I know that his arrest was -- he was arrested at 2 a.m. I don't know --

THE COURT: Okay.

MS. JINDAL: -- whether he slept or not between then and 8 a.m. when he was interviewed, but I think that even when someone's tired, the level of clarification and the amount of back-and-forth made it clear that he wasn't following what was being said, number 1. Number 2, he tells the agent that he's from Guerrero, he says Mixteco, and at that point this agent, who's very experienced, didn't stop to say okay, you're clearly not following me, let me try to see if you would prefer to go forward in Mixteco or if a Mixteco interpreter would help you, and --

THE COURT: Do you speak Spanish also?

MS. JINDAL: I do not, but what I do -- what I can do from having this job for two and a half years is understand a little bit, enough to get through our initial visits with clients. I can't speak it, but I can understand what's happening. And I think what this case boils down to, your Honor, is the level of competency of the language. So the same way that I may be able to, with my limited Spanish abilities, go to a restaurant in Tijuana and be able to order food or request a glass of water, that's not the same as having the Spanish abilities necessary to get through a deportation proceeding. I mean what we have here is very complicated terminology --

THE COURT: Right.

MS. JINDAL: -- and I mean none of us knew what an expedited removal was before we started this job --

THE COURT: The standard of proof at an evidentiary hearing like this is preponderance of the evidence, correct?

MS. JINDAL: Correct.

THE COURT: So on the issue of whether I find that he had an adequate understanding of Spanish or could speak

Spanish, I simply have to make that finding by a preponderance, more likely than not, that he did understand Spanish and wasn't, you know, at a loss because they weren't speaking Mixteco dialect?

MS. JINDAL: I believe that's correct, your Honor.

THE COURT: I think that's right too. I mean factual findings typically have to be supported by a preponderance-of-evidence standard. I just wondered if it was any higher standard. You know, I might be with you if it was a much higher standard like proof beyond a reasonable doubt because there is some room for doubt based on some of the nonresponsive answers. And I'm not trying to find justifications for it. It did appear to me he was tired; that would be logical if he'd been up all day and then crossed at night, got caught at 2:00 in the morning, brought into a cell. Maybe he slept some, but, you know, not a great opportunity to get a good night's sleep before an interview. You know, I watched him, and as a human being, at times when I've -- you know, I've had to engage in dialog with people when I was very, very tired -- and his mannerisms -- I take your point that he's got a twitching eye, but his mannerisms kind of reminded me of my own when I'm really tired; you're kind of sitting there, your senses are dulled, you know, you're rubbing your face, all things that I do when I'm really tired and someone's trying to engage me, usually my wife. So that's the take I had on it, Ms. Jindal, as I looked at that. Now, you know, I wasn't there, as you say, I'm simply trying to reconstruct this, but that's what my -- that's what my senses tell me, that he was -- that at least his fatigue was part of what I was seeing there, apparent fatigue.

MS. JINDAL: But I don't think that the level of -- even if he was fatigued, I think what is still very clear from this video is, you know, when it comes to even a simple question of "What is your name?" he answers with just his first name --

THE COURT: Right.

MS. JINDAL: -- requires a follow-up, and he follows up, but then when you get into more complicated issues like how he entered --

THE COURT: Right.

MS. JINDAL: -- and how he -- you know, why he's afraid to go back to Mexico, we get these answers that really just don't make sense and that are very hard for us to follow and for Agent Barba to follow. And then the --

THE COURT: You know, that was certainly my first impression when he said "I entered at the booth" because I thought wait a minute, this isn't a guy that's presenting himself at the booth. But we got clarification on that; there's a marker out in the middle of nowhere that's a tollbooth, and the agent says yeah, they frequently cross there. And she understood his reference to the booth to be that marker, not the port of entry, so that sort of clarified it.

The other thing she said that was interesting when she does these interviews commonly is that she'll ask somebody if they're a citizen of Mexico or where they're from, and they'll give the province or the state rather than the country, and she says that's not uncommon either, which is what he did. Now, he had to be prompted several times, and she finally had to say "So you're a Mexican citizen?" I did pick up on that.

MS. JINDAL: Even when she explains to him what a citizen is --

THE COURT: Right.

MS. JINDAL: -- you know, Mexico, Canada, United States. She asks him then about the citizenship of his parents and he --

THE COURT: Yeah, we're --

MS. JINDAL: -- again says --

THE COURT: -- focusing on really what was sort of corroborative evidence of his ability to speak Spanish by talking about the interview she conducted in the fall of 2014. Agent Lopez interviewed this fellow in 2008 -- and he impressed me as a conscientious person that doesn't cut corners -- and he testified that in -- on occasions where there's been, to him, where it was apparent that someone wasn't understanding the language he was speaking, whether English or Spanish, that he didn't hesitate to call the interpreter numbers and use an interpreter, and I found nothing in his testimony that was questionable to me; it appeared to me that there was clear communication between him and Mr. Herrera 2008, which is the issue I'm focused on now.

MS. JINDAL: And that is the main issue, your Honor, is what happened in 2008 at the expedited removal. Now, Agent Lopez was forthcoming in saying he doesn't remember Mr. Herrera-Hernandez specifically --

THE COURT: Of course.

MS. JINDAL: -- of course, right? It's been six years, he's seen thousands, I'm sure, of individuals in this similar situation since then. What -- what I think we do -- what we can extrapolate from Agent Lopez's testimony is that his testimony is based on review of his record of sworn statement.

Now, your Honor has reviewed that record of sworn statement; it was attached to my motion to dismiss. I believe it was also attached to the government's motion to dismiss -- and now we've also seen this video of a conversation between agents and Mr. Herrera-Hernandez. And what I think undermines the credibility of Agent Lopez is what we now have is the fact that these records of sworn statement are only summaries. The agents concede that they do not consist of verbatim back-and-forth dialogs, and we saw how what we watched on the video didn't translate exactly into the record of sworn statement in the --

THE COURT: Actually I'm not sure that it is the evidence with respect to the sworn statement in 2008. I asked him, you know, do you look up before you record the statement, do you look at the person when you ask the question, and he said yes, I do, and he said then I record the statement after they give it to me, then I look up again and ask them the next question. So I got the -- I formed the conclusion based on his answers that it was a back-and-forth dialog without any level of lack of understanding.

MS. JINDAL: But he did admit that what's on his record of sworn statement is only a summary of what Mr. Herrera-Hernandez says and that it's not --

THE COURT: Yeah, but it's --

MS. JINDAL: -- a verbatim transcript of what was said.

THE COURT: No, it's not a transcript, but I have it here, and, you know, there are answers given. It's not just a summary; indeed, there's specific questions and answers to those questions, so it's more than a summary. I mean I take your point that he's following a form and he's asking questions from the form and then recording the answers, but that's not a summary.

MS. JINDAL: But what it doesn't show, your Honor, is the level of clarification and back and forth that could have been or likely was required in order to get to these answers. We saw -- we saw in the video how a simple question "of what country are you a citizen of?" required three clarifications.

THE COURT: Right.

MS. JINDAL: Then we look at Agent Lopez's record of sworn statement from 2008 and we see that same question of "of what country are you a citizen?" and the answer is "Mexico." Now, it seems highly unlikely that the answer was so straightforward in 2008 when in 2015 -- 2014 it took, you know, four minutes to get to that answer. And so my point is that the record of sworn statement doesn't tell us the whole picture. It doesn't give us a sense --

THE COURT: Right. I agree --

MS. JINDAL: -- of whether he's actually understanding or not.

THE COURT: -- I agree with you that a video would be better because it allows us to look at nonverbal behavior as well as the answers given and whether there's any hesitation in the question and answers, whether answers are responsive initially to the question put; a video is certainly superior to a written report about what happened.

MS. JINDAL: And we also see that in the video he says "Mixteco," there's no follow-up about that, and that undermines Agent Lopez's testimony that it's standard practice when another language is referenced --

THE COURT: I don't know how it undermines it. It's a different agent conducting the interview, you know, six years later in 2014. He testified based on his custom and habit and what he does. So that another agent doesn't, you know, maybe follow the same practice, I don't think it undermines Agent Lopez at all. He seemed very credible to me.

MS. JINDAL: I believe he was also testifying about the practices of the Department of Homeland Security when --

THE COURT: Well, I asked him about his habit and custom, and, you know, it's based certainly on training that he's gotten if that's what you mean, but the focus of my questions to him that he answered were, you know, is it your habit and custom to do this, what do you do if you encounter somebody that you perceive is not understanding. So he -- my take on his testimony is he was relating his own experience in doing this, not purporting to tell us what other people do.

MS. JINDAL: I would -- I would still stand by my argument that that record of sworn statement doesn't give us the full picture. I think that watching the video is very enlightening in seeing sort of how things got lost in translation between what really happens and how they're documented in the record of sworn statement. I thought Agent Barba's testimony that the mumbling could in fact have been Mixteco, could have actually been a language she just doesn't understand also sheds light on the fact that often individuals could be trying to communicate and it might just be that the agents aren't understanding because both of these agents, including Agent Lopez, testified that they don't speak or understand Mixteco.

THE COURT: Okay. Anything else?

MS. JINDAL: That's all I have on the due process violation.

THE COURT: Okay.

MS. JINDAL: I'm happy to address prejudice if the Court would like.

THE COURT: All right. Mr. Katz, anything else?

MR. KATZ: A few things to respond to that, your Honor. First, we're not in the same spot we're in in Raya-Vaca with regards to the 2009 removal. As I said at the beginning of this hearing, the claim in -- regarding the 2009 removal is the exact same claim that's made with respect to the 2008 removal: He didn't speak Spanish. That I believe the evidence has shown should not be credited. The fact that what he claims to have said to the officers on both occasions is verbatim the exact same thing, the same phrase, and somehow that's a practice that he abandoned in the meantime, he didn't do that in 2014 -- we saw he was specifically asked about the language, and he responded -- now, granted, he was only given English and Spanish, but he responded "Spanish."

THE COURT: Have you spoken to the agent who talked to him in 2009 or is that person available; do you know?

MR. KATZ: I have not spoken to -- so we've got a number of removals. I want to make sure I get it right.

THE COURT: Ms. Jindal points out the defect in that one is that there's a blank where it says, you know, in what language did you conduct the interview, unlike 2008 where Agent Lopez wrote in "Spanish."

MR. KATZ: Right. I understand that --

THE COURT: I mean I wouldn't assume that they talked to him in English because he doesn't -- obviously he doesn't speak any English.

MR. KATZ: No. I'm taking him at his word he says that it was English and Spanish that he recalls from that, so there was Spanish spoken there.

THE COURT: Yeah. So we have his declaration and statement about his proficiency with Spanish --

MR. KATZ: Right.

THE COURT: -- but I'm -- it's not exactly like

Rava-Vaca -- Raya-Vaca because there the government just outright conceded that.

MR. KATZ: Right, and we are not doing that with respect to --

THE COURT: No, I understand that, but the proof with respect to 2008 is certainly more substantial here than it is with respect to 2009. You know, I can avoid the whole issue by not ruling at this time on the 2009, and if you want to bring in somebody to augment the record on that or, you know, if -- if you don't, then I'll go forward with what I have.

MR. KATZ: The second thing, your Honor, turning to this issue of the quality of the record of sworn statement, that they're not verbatim, you know, transcriptions of what took place, that's true, but both agents though testified that they then review what they're putting into that summary with the alien before the alien signs it -- that's apparently on the face of the document -- that both agents confirmed that that's their practice. And so this idea that something so monumental got lost in the shuffle is -- you know, the Court can discount that by noting that the defendant initialed each page and reviewed it and signed it after that had taken place, essentially signed off on that summary. It's not a transcription, it's not intended to be a transcription.

The idea -- I think there's also an assumption here from Ms. Jindal that the 2014 interview that we are fortunate we do have the video of, it couldn't have gone -- it's not possible that the 2008 interview went smoother, that in the 2008 interview the Spanish was better. But I'm not sure that that's the case; in fact, I would argue the opposite is true. You know, your Honor, you know my position with respect to the defendant's declaration, but even taking him at his word, 2008 was when he was presumably at the peak of his Spanish abilities; that's when he concluded the learning of the Spanish that he knows. Seven years later, six years later when he was removed in 2014, presumably that has degraded some, if anything. He says when he learned his Spanish, and it was --

INTERPRETER MR. NOVOA: Can I have a moment, your Honor? The Mixteco interpreter needs to take some water.

THE COURT: Sure.

(Brief pause in the proceedings.)

INTERPRETER MR. NOVOA: Thank you.

THE COURT: Okay.

MR. KATZ: And finally, your Honor, with respect to the idea that merely referencing the idea that someone is Mixtec was that Agent Lopez testified that that would be enough for him to call an interpreter. That's simply not the case. What Officer Lopez testified to was that if the defendant had asked for -- said he didn't understand Spanish and asked for a Mixteco interpreter or it was clear that he was not understanding the questions in the course of the interview, he would have called for an interpreter.

The defendant here did neither of those things. He did not ask for a Mixtec interpreter; he just said I'm Mixtec. At the time he was conversing in Spanish, and we have testimony from Agent Barba that -- as to why she didn't call an interpreter, and it follows that same line of reasoning: I was talking to him in Spanish, we were getting the answers that we needed to get.

I think the standard as far as the language here is important. The standard isn't that no clarification is necessary, that no follow-up questions are required. The standard from 8 CFR 2335 (3), which sets the procedure for expedited removals, says that an interpreter is required if necessary to communicate with the alien. Even in 2014, which logic dictates was probably the worst of the two interviews when it comes to the communication barriers, if any, Agent Barba was able to communicate with the alien; his Spanish met that level. And so from -- in terms of the CFR with respect to expedited removals, that Spanish level is met. Even looking at what's presumably the higher standard, the level of translation necessary in the context of formal immigration proceedings with an immigration judge, in Asican v. Holder, which we cited in our response, the Court held that even a faulty -- an admittedly faulty translation didn't violate due process rights where the alien -- and I'm quoting here -- understood and answered the vast majority of the questions and never stated that he could not understand or consistently gave answers completely unrelated to the questions. The defendant here --

THE COURT: All right.

MR. KATZ: -- never stated that he couldn't understand; he understood and answered the vast majority of the questions, and he didn't give answers completely unrelated. Some amount of clarification was required, some amount of going over points was required, but eventually they got there, and so the level of Spanish necessary, he had that level of understanding, could comprehend, and so consistent with what we saw in 2014, he was able to go forward in that.

And so I think it's also relevant, your Honor, that we saw him respond to a few commands in Spanish and to do so without having to be, you know, called over multiple times. Agent Barba on the video says "Come closer," and he immediately comes closer. It's clear that he understood that. Agent Barba says "I need your initials here and your signature here." The response that we see from Exhibit 15 is that he -- she gets initials in one spot and a signature in another. "Initials" is an awfully specific word, your Honor.

"Initials" is something that, you know, is not like ordering a glass of water in a restaurant in Tijuana. Initialing a document requires a higher level of Spanish, and, you know, I'm not saying that -- I think that gives us a good clue, your Honor, as far as the level of Spanish.

THE COURT: Well, of course the space on the form is smaller for his initials than it is for signature too, right?

MR. KATZ: It is.

MS. JINDAL: And I'm not sure what the word for "initials" is in Mixteco, so it could be similar.

THE COURT: All right. I have both parties' position. Thank you. I appreciate your arguments.

MR. KATZ: And, your Honor, I won't parrot what we have, but it's also our position that you don't need to necessarily even -- even if with this violation there's no prejudice here, and I don't think either of us has covered the prejudice argument; we obviously disagree there.

THE COURT: All right. All right. Thank you both. The Court finds as follows. First, as I mentioned to Ms. Jindal, I do not find that this case is controlled by Raya-Vaca for the obvious reason that we have a factual dispute here; that was not the case in Raya-Vaca. There, as I've quoted from page 1201, the government conceded a due process violation. Here they do not concede it. In fact, they contend no due process violation took place because there was adequate understanding on the part of the defendant as to his rights and to what was being said to him. So the factual question is -- has to do with the defendant's mastery of the Spanish language -- not the Mixteco dialect but the Spanish language proper.

The defendant has filed a declaration where he says, as I mentioned before, that he speaks Mixteco, it's the only language that he completely understands and speaks fluently. He goes on to say that he understands and speaks very little Spanish, the little Spanish he knows is what he's picked up from hearing others speak it while working in the tomato fields in Mexico from 2005 to 2008.

The Court has reason to question his credibility on those statements. They're sweeping statements that really don't match my observations from the video of 2014. Let me be clear about this. It may be that he doesn't have complete mastery of the Spanish language, but it's clearly not the case that he understands and speaks very little Spanish. One watching the interview notes that the questions were put to him in a very fast-paced fashion. I had trouble sometimes, even though it was in Spanish, following it and even though there were subtitles underneath it because the agent was speaking so fast. But for the most part, there was no lack of understanding apparent to me. The defendant gave responsive responses to the questions put to him. Sometimes a question, I acknowledge, had to be re-put to him, but the answers for the most part were very responsive. The timing and sequence of the questions and the answers convinced me that there's no lack of understanding or confusion on his part. There may have been times, as I acknowledge, that they had to go back and clarify. Now, whether that is owing to a language barrier or, you know, just generally the awkwardness of a particular question put to somebody in the Spanish language I can't be sure of. The agent who interviewed the defendant in 2014 said it is common, or at least not uncommon, that when she asks "Of what country are you a citizen?" a person will frequently respond by telling her the province or the state where they're from and she has to follow up on that. So I don't attribute the fact that he didn't answer I'm a Mexican citizen necessarily to a language barrier; sounds like it's a fairly common thing that comes up with people because maybe the -- maybe the translation is different somehow or a little more awkward when it's put in Spanish than in English. If somebody asked me of what country I'm a citizen, I'd say I'm a citizen of the United States; I wouldn't say California or San Diego. But that's the way it works in English apparently. According to the testimony of the agent, who interviews many people, it's different in the Spanish language.

He was twice asked during the 2014 interview to come sign things. It appeared to me that he understood in that he immediately stood up, that he came over and signed those things. And, again, no confusion, no lack of understanding.

Now, again, the standard of proof here is important. If I were called upon to say, you know, beyond a reasonable doubt? Perhaps not, perhaps not. I think Ms. Jindal makes some good points, but that's not the standard here; the standard is more likely than not did he understand the Spanish language and did he understand the essential things that were being said to him. Again, the focus not on 2014 as much as it is on 2008. The 2014 testimony just is kind of confirmation that he understands the Spanish language better than he lets on in his declaration. This declaration is phrased in the here and now. I mean it appears he's saying even today I don't understand the Spanish language, and I find that not to be true.

Now, I've not had the opportunity obviously to evaluate the defendant's credibility. I just see, you know, as I said, rather sweeping statements on a declaration. He's not submitted to cross-examination, and the government didn't call him, which I think you had a right to do, Mr. Katz, if you wanted to; he's got Simmons protection here, so you could have called him. But the point is I didn't have an opportunity to evaluate his credibility.

I did have an opportunity to evaluate of credibility of Officer Lopez, who interfaced and communicated with the defendant in 2008. Officer Lopez struck me as completely by the book, completely credible and professional. He struck me as someone who doesn't cut corners. That's what he testified to; I asked him specifically. He appeared to me, as I watched him testify as I put questions to him directly, to be very credible, and I believe what he says that had there been in his mind any lack of understanding in 2008 when he spoke with the defendant, he would have stopped the interview at that point, called the number, which he says he's done on maybe 50 other occasions, and gotten a Mixteco interpreter to help out. There wasn't a lack of understanding. That sort of dovetails with what I saw in the video six years later. Yeah, there's certain points where things had to be pointed out, but as the government points out, the standard here -- and this case is persuasive while not binding because it's a nonpublished case -- but the Ninth Circuit has said in Asican v. Holder -- A-s-i-c-a-n v. Holder -- that it's enough that the defendant understood and answered the vast majority of questions, never stated that he could not understand, or consistently gave answers completely unrelated to the questions. That characterizes at least the interview that I saw here. He never said I lack understanding. His answers for the most part were responsive. Some clarification was needed on others. But if the question is, you know, did he understand Spanish, did he understands the gist of what was being put to him, the answer from my perspective, listening to the witnesses, is clearly yes. And you're right, we don't have a -- we don't have a video of Agent Lopez's interview with him, but we have the next best thing, which is in-person testimony from a fellow that's done this many, many times, testified as to his custom and habit, and whom the Court finds to be credible, having evaluated his credibility. I mean if it comes down to a credibility contest between Agent Lopez's version and the defendant's version in writing, then I credit Agent Lopez. Like I said, he didn't hesitate in answering, I was able to watch him to observe his demeanor. I find him to be credible, and I credit his account over that of the defendant regarding the defendant's proficiency in the Spanish language.

So all that to say I don't believe the defendant's declaration that he doesn't adequately understand Spanish such that the answers that he gave to Agent Lopez were unknowing, confused, and that he was just complying with what he was told to do; rather, I credit the agent's account that he would ask the defendant a question, get an answer, record the answer, look at the defendant, get another question; that there was no apparent confusion in 2008 preceding the defendant's removal at that time; had there been, he would have taken additional steps. And accordingly, I don't find any due process violation with respect to the 2008 expedited removal. I don't need to go any further than that at this point because the motion is to dismiss for lack of an element; a single deportation would satisfy the element.

Ms. Jindal -- I want to look back at the case that she cited with respect to whether collateral attacks on priors can be mounted at a sentencing. She says yes, they can. So I'll look at that. And if the government wants, I'll give you an opportunity to put on more evidence than that. I don't need to go much further.

There's something to what Mr. Katz says, which is if he's proficient in the Spanish language in 2008, he's probably also proficient in 2009. Yeah, it's troublesome that the blank is not filled in there as to what language, but look, it would be a real stretch to say oh, they must have spoken to him in English. I mean either they spoke to him in Spanish or Mixteco. I don't think they spoke to him in Mixteco because that would probably be noted, so I'm going to assume -- common-sense assumption is he was -- they discussed it with him in Spanish notwithstanding what he says.

I mean I also find -- I have to tell you I also find some reason to question his recollection of these interviews, the defendant's. At another point in his declaration, paragraph 31, he says the agent didn't read the paperwork to me, if he did read the paperwork it was not in a language I understood. Well, either he did or he didn't read the paperwork to him. And he says if he did -- and I don't know. I mean he was there, I wasn't, but he's now backtracking. I mean it's an affirmative statement to say he didn't read the paperwork to me. One would know, regardless of what language, if somebody's reading something to him from paperwork, and he makes the assertive statement to begin with at 31 that no paperwork was read to him, and then he backs away from that saying "if he did read the paperwork." And I think -- to me that goes to his credibility too. It's not one of these things; either he read the paper or he didn't. If you don't understand what's being read to you, that's one thing, but he's not saying that; he's saying -- he's making an assertive statement that the person didn't read paperwork to him. One would know that by watching a person looking down and reading something if he didn't understand the language.

So suffice it to say I find that there is plenty of reason to question the defendant's credibility on this question of his understanding of the Spanish language. I think he understands the Spanish language, I do. I don't doubt that his first language is Mixteco, but I think he's been around enough that he understand the Spanish language. That was evident to me in the video, and, as I said, I accept what I find to be the credible testimony of Agent Lopez respecting the interaction in 2008 between him and the defendant. Accordingly, Court finds that there's no due process violation here respecting the 2008 expedited removal. The motion is denied.

Now, the next issue is the stipulated facts trial. The Court has reviewed the stipulated facts. Is there any argument on this or is that matter submitted?

MS. JINDAL: Your Honor, I need to take another look at it again because I'm not sure if the stipulated facts contemplated a ruling on the 2009 expedited removal. I don't think --

THE COURT: Well, they might, but I don't even have to find that. It mentions both the 2008 and the 2009 deportation. Look at page 2, paragraph 2: The A file custodian, part A and B. A is the A number. B talks about the 2008 deportation. Then paragraph 2(c) talks about 2009. But I don't -- you know, it's frequently the case, Ms. Jindal, that facts are presented during course of a trial that aren't really necessary to the outcome, they're just additional stuff. I don't need to rely on that.

MS. JINDAL: And looking at it again, it's fine because I just wanted to ensure I didn't accede -- that there was no concession regarding the validity of the 2009 --

THE COURT: Right. There's not. You agree with that, don't you, right, Mr. Katz?

MR. KATZ: I agree, that this morning dealt --

THE COURT: It's just the fact of the deportation mentioned here.

MR. KATZ: Yes, your Honor.

THE COURT: So if there's nothing more, the Court's prepared to rule on that.

MS. JINDAL: Yes, your Honor.

THE COURT: The Court finds, accepting the facts that have been stipulated to as true, that on November 15, 2014 at 2 a.m., the defendant was encountered by a Border Patrol agent inside the United States. He was trying to hide in some brush. They were about five miles east of the Otay Mesa port of entry, and they were significantly within the United States, eight miles north of the border at that point. Defendant was placed under arrest at the time.

The records respecting the defendant reveal that he has been in the United States before; he had an assigned A number. As the motion kind of previewed, the defendant has been deported from the United States. One of those deportations occurred in 2008. It was an expedited removal. The expedited removal is documented in Government's Exhibit

1. I'm assuming you're moving for admission of all of the government's exhibits.

MR. KATZ: All the exhibits attached to the stipulation, yes, your Honor.

THE COURT: And there's no objection to those I assume.

MS. JINDAL: No.

THE COURT: So the Court admits those. And I do note it documents the defendant's removal from the United States in 2008.

(Exhibit Nos. 13, 14, 15 admitted.)

THE COURT: I don't think I need to make findings with respect to the other. It's conceded here that he's been removed on other occasions. What's not conceded is whether those were valid, legal removals, so I don't need to make findings, not on those, and I don't at this time.

The A file is linked to the defendant through a comparison of his fingerprints at booking with fingerprints in the file. Qualified expert Mr. Beers, former FBI agent and FBI fingerprint examiner, but you refer to him as a fingerprint expert -- I assume there's no dispute about Mr. Beers' expertise to compare fingerprints, Ms. Jindal.

MS. JINDAL: No, your Honor.

THE COURT: That's why they use the term "fingerprint expert" here.

MS. JINDAL: Correct.

THE COURT: Okay. So the Court finds that there's a match between the defendant's prints that were taken in this case and the A file such that the 2008 deportation can be attributed to him. It's conceded that at the time of his entry in 2014, the defendant was not a citizen of the United States, in fact he was a citizen of Mexico, and that he voluntarily reentered the United States, he knew he was entering at the time.

Now, there's -- is there anything -- Mr. Katz, is there anything in here about how he had no permission as of that date?

MR. KATZ: Your Honor, the A file custodian would testify that there's no evidence that he had applied.

THE COURT: Is that -- is that in here? Have I just missed that?

MR. KATZ: I believe it's paragraph --

THE COURT: Oh, yes. Here it is. I see it.

MR. KATZ: -- (f)(2).

THE COURT: Yeah, (f)(2). And then finally, that the defendant did not have any legal right to be in the United States, he hadn't been given permission by the Attorney General or any designee. So those things match the elements of 1326 violation with which the defendant is charged. He's actually charged with being found in; is that correct?

MR. KATZ: Yes, your Honor.

THE COURT: So I do find that he was found in the United States, that he was found in the United States at a time after he had been previously deported from the United States, that as of the date of the charge here in November -- was it November 14 --

MR. KATZ: November 15, your Honor.

THE COURT: -- November 15, that he had no permission given to him by the United States. So I conclude that he illegally reentered the United States, was found here, after being deported, in the United States. In short, the stipulated facts tracked the elements of the statute and prove to my satisfaction and without contest -- because they are stipulated facts -- beyond a reasonable doubt that the defendant's guilty of reentering the United States and being found in the United States on November 15, 2014. I do find him guilty.

Now, does he have -- other than the conviction in front of me for which he was placed on probation, he has no criminal record, right?

MS. JINDAL: Correct.

THE COURT: But there was some evidence that he'd been in the United States or been caught a gazillion times or a bunch of times? How many times?

MS. JINDAL: Not a gazillion. I believe it is --
THE COURT: I got the impression he's been kind of a pest; he keeps coming back and we keep saying don't come back, but otherwise he's not a bad guy.
MS. JINDAL: I think it's 12 times.
THE COURT: Okay.
MS. JINDAL: Eleven or 12.
THE COURT: So I don't know that we need a probation report unless either side requests it. I would find here, just previewing guidelines, that the defendant has accepted responsibility. A stipulated-facts trial is -- really saves a lot of resources, and, you know, other than making a legal challenge, he hasn't made a factual contest, so I'd be prepared to give them that. Are you prepared to offer the additional point for acceptance here? Two points I can give him, the third point comes on your motion, but I think he deserves it.
MR. KATZ: I don't think he gets to 16, your Honor.
THE COURT: Oh, okay. So it would be maximum of two --
MR. KATZ: I don't think so. They're --
THE COURT: All right. So we have a question about whether plus-four enhancement applies, and that turns on the 2009 deportation I guess. If you want to rest on the evidence you've presented, I can make a finding on that. If

you want to call somebody else to explain the gap and testify, you know, whether -- first of all, whether he remembers Mr. Herrera, and second, you know, whether that gap means he spoke Nigerian rather than Spanish to him, I can take evidence on that.

MR. KATZ: Your Honor, I think the evidence we've submitted with some brief additional argument from me regarding the prejudice issue because I don't think the Court needs to get to additional evidence.

THE COURT: All right. We can leave that for sentencing if you want; it's a sentencing matter.

MR. KATZ: I'll leave it for sentencing, your Honor.

THE COURT: How much time did he do last time, Ms. Jindal?

MS. JINDAL: I think he spent a little over 70 days in custody.

THE COURT: Seventy days?

MS. JINDAL: Seventy, yeah.

THE COURT: And he stayed out for a period of time or are any of the 12 in between when I last sentenced him and put him on probation and he promised me he wasn't going to come back anymore?

MS. JINDAL: Your Honor --

THE COURT: He did promise me that. How long did

he stay out after making that promise to me?
MS. JINDAL: Three and a half years.
THE COURT: Okay.
MS. JINDAL: He stayed out from when you deported him until --
THE COURT: How long has he been in custody now?
MS. JINDAL: Over three months, since November.
THE COURT: Sixty days. Or 90 days?
MS. JINDAL: Ninety days.
THE COURT: Okay. Well --
MS. JINDAL: Actually -- sorry -- over four months. I apologize.
THE COURT: So 120 days?
MS. JINDAL: Over 120 days.
THE COURT: And he did 70 days before?
MS. JINDAL: He did 70 days before and stayed out for three and a half years.
THE COURT: All right. And no other criminal record?
MS. JINDAL: No.
THE COURT: And on these apprehensions, when did they occur?
MS. JINDAL: The apprehensions occurred primarily in 2008 and -- so it looks like there are about six in 2008, six or seven, two in 2009, five in 2011, and then he gets

convicted of 1326. As your Honor knows, had he been given a sentence of time served and three years of supervised release, he wouldn't have been on supervised release anymore and --

THE COURT: He didn't get that sentence though.

MS. JINDAL: He didn't that sentence, he got a probationary sentence, so he's only in criminal history category II currently.

THE COURT: Yeah.

MS. JINDAL: And honestly I was going to ask the Court if we could just go forward with sentencing today because we have the Mixteco interpreter here and I know it's costly to the Court because -- to have her come out, and rather than having this pushed off to a separate date, I thought maybe we'd --

THE COURT: No, I understand that, but look, he's been in now you say about 120 days?

MS. JINDAL: Over 120 days.

THE COURT: And he did 70 the time before, right?

MS. JINDAL: Correct.

THE COURT: Are you satisfied with that, Mr. Katz, at this point? This fellow's not public enemy number 1; he's very different I think from most of the 1326 defendants I see, and I'm not going to throw the book at him. I'm disappointed that he didn't keep his word to me and he came back; on the other hand, he stayed out for -- three years you say?

MS. JINDAL: Three and a half years.

THE COURT: Three and a half years. So he's got a big family, he's got seven kids and a wife down there. I'm assuming that, you know, aside from all these deportations, he comes close to being like an economic migrant rather than one of the crooks that we usually see, right, not been to state prison or any of that stuff. So he's very different in kind and --

MR. KATZ: Yes, your Honor. The only thing I'd add to that is, you know, we do have evidence that he has served as a foot guide in the past.

THE COURT: Yeah, but was that -- that was before the last time?

MR. KATZ: That was before the last time, yes.

THE COURT: Yeah. Was there solid evidence of that? Because it doesn't -- if he'd been guiding people and that was the explanation for all the apprehensions, then I probably wouldn't have given him 70 days.

MR. KATZ: We have two reports that I've seen, your Honor, in the A file that indicates --

THE COURT: But here he says he's going to San Maria, and apparently he's going up there to work this time and --

MR. KATZ: Yeah. I'm not suggesting that he was foot guiding in this instance, your Honor. It's just --

THE COURT: How many people were with him this time?

MR. KATZ: I'm sorry?

THE COURT: How many others were with him?

MR. KATZ: He was caught specifically with one other person. The agent believed, in my discussion with Agent Clare, the apprehending agent, that there were more than that and they sort of broke up in that time between --

THE COURT: But there's no allegation that he was guiding anybody? He's just a fellow --

MR. KATZ: No, your Honor.

THE COURT: -- traveler this time?

MR. KATZ: I bring it up only with the response to was he exclusively an economic migrant each time.

THE COURT: Yeah. Well, I'm going to treat him as essentially an economic migrant this time. And as I say, I'm disappointed because he promised me he wasn't going to come back anymore and I let him go, you know, with very little punishment last time and here he's back again within the period of time that, you know, it's still actionable to find a violation. He faces a probation violation and sentencing on a new charge, right?

MS. JINDAL: Correct.

THE COURT: You agree the Court can take judicial notice of its finding of guilt on this case and that if it does that, it necessarily means that he's in violation of probation? I set two conditions, that he not come back and he not violate United States law. It appears to me that he's done both. Do you agree with that, at least with that finding; you don't contest it?

MS. JINDAL: Yes, your Honor. He will -- he's willing to admit that violation.

THE COURT: All right. So I find, taking judicial notice of the finding that I just made on the new case, that he's in violation of probation. You know, Ms. Jindal, I appreciate that the Mixteco interpreter's here, but he's dealing with two matters, and like I said, I'm not going to throw the book at him, but maybe some further demonstration of consequences is necessary so he stays out, you know, longer, doesn't come back anymore unless he has permission to come back. I'm not sure 120 days suffices for, you know, both things that are at issue here; one's punishing him for the new offense and other objectives, and the second instance addressing the breach of trust, which has a year and a half left on it, you know.

MS. JINDAL: And I wasn't implying that 120 days was what I would be requesting the Court to do. What I was suggesting was just for efficiency and cost efficiency purposes, it might be easier to --

THE COURT: I'd be inclined to -- I'd be inclined to put him on probation again on this case. You're right, I mean I think the point you make underscores the wisdom of putting somebody on five years' probation because you're right, he'd be ollie ollie oxen free if it had been no supervised release or just three years. But he can't come back here until he has permission. And while, you know, a consequence is attached to that for up to five years based on the old case, the point is that he shouldn't come back and violate the law irrespective of whether the old case is still alive or not because then look what happens, they charge him with a new case.

So -- but I'm -- you know, I'm sympathetic to his circumstances, and I do see huge differences between him and most of the defendants convicted of these offenses. Maybe the best thing would be to come back for sentencing. He was arrested in November?

MS. JINDAL: He was arrested in November, so it's been a little over four months. And I agree that -- and I think Mr. Herrera-Hernandez would agree to waive presentence report and get the earliest possible sentencing date so --

THE COURT: Have you talked to him about that?

MS. JINDAL: I have talked to him, and he is in agreement with wanting to get his sentence as early as possible.

THE COURT: What if he were to come back June 1st? That's a Monday. I can probably deal with both cases on June 1st.

MS. JINDAL: The reason why I'd ask for a date earlier than that, March 24, is, first, there's no presentence report since we -- I think that -- I know Mr. Herrera-Hernandez well enough to be able to provide the Court via sentencing memo or oral allocution a lot of information about his history and circumstances. At this point I don't know if he would appeal the denial of the 1326 (d) motion, I don't know if he would appeal the sentence. Your Honor's indicated that you might give him probation; if that's the case, there may not be an appeal.

THE COURT: No, I can't bargain with him over that. In the past when I've tried to do that, Maxwell's silver hammer came down on my head, so --

MS. JINDAL: Well, the reason why I bring up the date of sentencing though is that his guidelines are not high. On the probation case I think he's -- he's in category I. He had no convictions at the time in 2011. His guidelines are probably four to ten months. On this new 1326 case, his guidelines are eight to 14 months. So the reason why I bring this up is should he choose to pursue his right to appeal --

THE COURT: Right.

MS. JINDAL: -- we're in expedited appeal territory because he's not going to be looking at years in custody like a lot of -- a lot of clients who end up going through this level of litigation.

THE COURT: What if I were just to sentence him right now on the supervised -- excuse me -- on the probation violation, and, you know, depending on what that sentence is, having him come back at the expiration of that? I can tell you this. As you know from being in front of me, I routinely take into consideration the fact that a guy's facing a double whammy, and I don't treat those things as entirely separate, particularly when they grow out of the same nucleus of facts; the probation violation is because he committed a new offense. So I think it's fair and it's in his interest to impose sentences that account for each other and even though the objectives under 3553 are different in both instances, at least somewhat different. So I could do that today, and we could set sentencing, you know, at -- near the end of the expiration of the supervised -- the probation violation sentence. You say it's four to ten months, right?

MS. JINDAL: It's four to ten months.

THE COURT: So we're close to the low end on that. I'm not necessarily on the low end on the breach of trust --

MS. JINDAL: I understand.

THE COURT: -- I'm not at the high end either, but, you know, I'm thinking that a sentence that, you know, takes him out to June 1st on the probation violation, and then he can come back on that particular day and be sentenced also on the new case. No harm, no foul because he's doing time anyway.

MS. JINDAL: That's true, your Honor. And if that's where the Court is --

THE COURT: If you're agreeable to that, then --

MS. JINDAL: My hesitation again was just his right to appeal because if he ends up --

THE COURT: Well, you can --

MS. JINDAL: -- wanting to pursue it, he's going to be out of time if he can only file it in June when his custody started in --

THE COURT: Look, in the ordinary course we'd have 11 weeks anyway, right, and --

MS. JINDAL: That's true.

THE COURT: -- I'm not talking about going out that far now because here we are toward the end of March, April, May, 1st of June, that's 60 days.

MS. JINDAL: We're fine with that.

THE COURT: Okay.

MS. JINDAL: So we can proceed on the OSC right now.

THE COURT: Okay. So I'm happy to hear from you. The guideline range is four to ten months. And I'll also hear from Mr. Herrera before I determine --

MS. JINDAL: Sure. I'm going to ask him to just come stand up next to me.

THE COURT: Okay.

MS. JINDAL: Well, your Honor has a lot of information about Mr. Herrera-Hernandez through the litigation of the deportation motion.

THE COURT: You want to adjust the mic a little bit for the interpreter.

MS. JINDAL: What I can -- what I can shed -- the light that I can shed to the Court about Mr. Herrera-Hernandez aside from what we've just discussed the last couple of hours is that he's an incredibly respectful man. He has a very limited education; he's only gone to school for less than a year when he was seven or eight years old; so he only went to school for less than a year.

He describes himself as a poor farmer; that's what he's done his entire life. He has a large family, a wife and seven children, whom he supports. And he's been incredibly patient in what is a pretty complicated process that we've dealt with here for the last four months. I've had to meet with him multiple times, and those meetings tend to be quite long because we use the Mixteco interpreter, who our office has to contract out to come with me, so we cover a lot of information during our client meetings. And he's always been very patient and very understanding and tried his hardest to kind of wrap his head around what exactly is happening here in terms of the process of the case.

From the beginning he's always recognized his mistake, and your Honor sees that through the stipulated-facts bench trial. To his credit, he stayed out for three and a half years, which your Honor is well aware of. During that time he was working in Mexico in the fields. His family lives in Guerrero, but he frequently would live in Sinaloa with a -- in a community of Mixtecos in order to work in the fields and be able to send money back to his family.

I don't think your Honor will see him again. I know that your Honor's disappointed to see him again, but I can say that this has been a very difficult situation for him. Being in custody, for him, is a little bit harder than some of our typical defendants. First, he's not a hardened criminal. He's not used to being exposed to people who have very different backgrounds, criminal backgrounds, than him. Secondly, he's apart from his family. That's the whole reason why he was coming back to the United States, to make some money. I filed the declaration. The money he makes in Mexico is just pathetically low. But third, I referenced the eye-twitching issue that he has. It required effort in conjunction with me and the marshal to get him medical treatment in GEO because he can't communicate to the guards there, and the marshal's contact was very responsive and very helpful, and actually there was a point where we were going to have a Mixteco interpreter come in to the doctor's visit, but it required a lot of coordination.

THE COURT: Is he on medication now for his twitching?

MS. JINDAL: I think he's being treated.

THE COURT: Okay.

MS. JINDAL: He had to see a specialist, but it went -- it was a while before he received treatment given his communication barrier. So being in custody is a lot harder for him. And on top of that, your Honor -- and this is kind of to Ms. Trujillo's credit because she has been the interpreter who's accompanied me on these visits -- and he made it quite clear in the beginning he has no way to contact his family; he doesn't know their phone number, but he also doesn't have money. So he's not -- not somebody who is having access to commissary and to the benefits of being in custody because he doesn't have access to money, and I bring up Ms. Trujillo because she was generous enough to help him out in that regard. So he wasn't coming back just to kind of -- in spite of, you know, the Court's promise that he made.

THE COURT: What did he do for three and a half years there? Did he work in Mexico?

MS. JINDAL: He worked in the fields, yeah.

THE COURT: Okay.

MS. JINDAL: So while there has been a breach of trust, I think that the situation is quite mitigated given his personal life in Mexico and the reason for why he returned and the fact that he stayed out for so many years. And in light of that, I would request a low-end sentence of four months.

THE COURT: All right. Mr. Herrera, you also have the opportunity now to speak to me and tell me what -- anything you have to say. I want you to understand what this proceeding is. In 2011 I placed you on probation. I let you out of jail. You were in front of me, and I said Mr. Herrera, now, you can't come back anymore. And you said yes, Judge, I understand. And I asked you if you promised me you were not coming back anymore, and you said yes, I promise, I won't come back to the United States. And I said okay, I'm going to trust your promise, we're going to have you on probation for five years. If you come back within five years, then you're going to have to answer to me for breaking your promise.

So that's what this is about today; that's the case that we're dealing with right now, not this new charge that you've just been convicted of but the old case where you pled guilty to coming into the United States illegally and after being deported. And you face -- you face a sanction, a jail sentence, for violating your promise to me, breaching the trust that I placed in you. So what I'm asking you is if you want to speak to me about that, anything you want to tell me about yourself or about the circumstances or maybe why you broke the promise that you gave to me, it's up to you to say whatever you want. Can you adjust the mic down so it's in front of Mr. Herrera.

THE DEFENDANT: I am poor and I need money. I have a large family, and I wish to return to them, with them.

THE COURT: All right. Listen, I'm sympathetic to your circumstances, I am, but you have to understand the circumstances here in the United States. We're very generous in our immigration policies. We allow many people to come in, more than any other country in the world I'm told; we have -- we allow more immigrants than any country does. But we have a process for allowing people to come in, a legal process where people apply, they wait in line, maybe they have to pay some fees, and then there's a determination made. I don't know whether you would qualify going through that process or whether you're even inclined to do it, but that's the process.

The other thing you should know is, of course, like any other country, we have a right to define our border and to protect our border and to make sure people that we don't permit to come in don't sneak in. We can't continue to be generous and allow all these people through the front door if we have a horde of people breaking down the back door by sneaking in, climbing over fences, or coming in through the hills. And this doesn't really apply to you, but let me tell you that the concern is heightened since we have been subject to attacks by people from other countries. You know what happened here 15 years ago when they came and knocked our buildings down. There's a lot of people from foreign countries that would like to get into the United States to do harm here, and so our border guards have to be very vigilant in guarding the borders, making sure people don't come in.

Now, again, I emphasize that the last point doesn't apply to you at all, I know you're not here to do any harm, but it does point out why we enforce the border the way we do and why we expect people to respect our laws and our sovereignty and, if they want to come in, to apply to come in, not just to take it on their own and come in.

Now, I understand you have a large family. I understand you were coming here to work. I made the point to your lawyer that you're very different from most of the defendants who are convicted of this charge. A lot of the people who are charged with this offense have not only come in illegally, then they -- then they commit some crime here in the United States, usually very serious crime, and they end up going to a state prison. And it's like a stick in the eye when they do that because they're not here -- it's not just that they're here illegally, but then they're committing illegal conduct in the United States once they get here. That's not you, and I recognize that.

But here's what your record is. We've told you many times don't come in like this, don't do this. They tell me you have had 12 different encounters with the Border Patrol in the last six, seven, eight years. And they catch you and they put you out and they don't refer you for prosecution; at least they didn't to start with. The prosecutor says oh, maybe some of those guys, he was even guiding other people in. I don't know about that, but that's what the prosecutor says is the records show that you may have been a guide on earlier occasions.

But the point is we've told you many, many times don't come back. And that brings me up to 2011. I remember you. I remember your face. And I see a lot of people, so it's unusual that I remember somebody, but I remember you. And I think it's probably because I was sympathetic to you then in 2011 as I am now, and because I was sympathetic when I sentenced you, you and I had a discussion -- do you remember me? Do you remember my face and being in front of me before?

THE DEFENDANT: Yes.

THE COURT: So -- and here was -- I don't have a transcript and I don't have a video like we saw today of your interview with the agent, but I remember generally what was said, and what I asked you back then was okay, look, you seem like a nice enough fellow, Mr. Herrera, you made a mistake, I don't like it that you've had to be told all this number of times, but if you tell me and promise me you're not coming back, I'll accept that promise and I'll let you out of jail and we'll send you back to your family. And then you said to me okay, Judge, I promise, I won't come back anymore, I'll stay in Mexico unless I have permission to come back in. Does that ring a bell with you? Do you remember a conversation to that effect with me?

THE DEFENDANT: I do remember.

THE COURT: Okay. And, you know, you seemed like an honorable man. A man's word and promise should be respected, and I respected that. But now I'm disappointed to see that you're back here after you promised me you wouldn't do this again.

So I don't like it that you're away from your family. I don't like that it you're in jail. Other than this -- other than the problem of coming across the border, you're not a criminal, and you should be home with your family. And I understand what you're saying that the wages aren't so good in Mexico, but there are many of your countrymen who get up every day and they work a job and they support a family and they don't come into the United States illegally. And of course you have no right to do that. You have to expect that our border guards are going to respond if they catch you coming in illegally, climbing fences or sneaking in through the hills.

So I'm disappointed that you didn't keep your word to me. And I'm not going to be harsh with you, but I think some sanction is appropriate because you did not keep your word to me and because I based the sentence originally on the promise that you made to me; I expected that you'd keep that promise, and I held back from imposing a longer sentence back in 2011 when I first sentenced you. So those are the things that I wanted to say to you.

I hope you don't come back to the United States in the future. You don't belong in jail here, but you have a bad track record of getting caught, and what you should know is that the sentences get longer every time you come back. You're no use to your family if you're in an American jail, so you need to keep that in mind. Anything else you want to say?

THE DEFENDANT: If I get thrown out, I won't be back.

THE COURT: I hope that's true. I hope that's true. I'm not going to ask you to make a promise to me anymore; I'm not sure I can trust the promise, but I want to tell you that if you do come back, the sentences are going to be longer and longer. And like I said, you don't look like a guy who belongs in jail, you just don't to me. Mr. Katz, anything on behalf of the United States?

MR. KATZ: Just one thing, your Honor. Mr. Herrera-Hernandez mentioned that he recalls specifically promising to you in his previous sentence that he wouldn't come back. I know we don't have the transcript in front of us. I think that -- you know, your Honor referenced Maxwell's silver hammer on another issue. I know that it's come up --

THE COURT: Came down on my head.

MR. KATZ: It has, your Honor, and so I just want to be clear that the defendant has said that he specifically remembers making that promise and that he also does not want us to take the time to continue this to get the transcript to confirm that that's the case. He's getting a benefit now, which is this sentencing now, which is his preference as we have just discussed.

Other than that, I think, your Honor, you hit on all the points. This is not the typical defendant that we see. I think that above the low end because he did breach that trust and he got a benefit in the form of that sentence there, but -- so the government's recommendation would be eight months in the four- to ten-month range.

THE COURT: He's been in custody now approximately 153 days?

MS. JINDAL: Sounds about right.

THE COURT: That's -- no, no, that's actually longer; he hasn't been in that long. If we went to June 1st, it would be 153 days. If it went to the end of May, it would be 153 days. And he has you said 70 days' credit on the probationary sentence? He was in custody 70 days before he was sentenced?

MS. JINDAL: Make sure I'm with you here. I think that it's 72. Got to find the judgment from that case to see --

THE COURT: Let's call it 72, Ms. Jindal. It's, you know, a day here, a day there, so I'll give him the benefit of the doubt on that.

MS. JINDAL: Okay.

THE COURT: The Court finds as a sanction for the breach of trust in promising the Court that he would not come back and being on probation and violating probation within the term of probation that a sanction of 220 days is appropriate, and I do impose 220 days. That is roughly seven and a half months. It's less than the maximum. It's about right in the middle between four and ten. Seventy-two days will be credited toward that sentence, and I've included that -- I've included that calculation. So the pronounced sentence is 220 days, but he'll get immediate credit for 72 days which he did prior to being placed on probation, which I think takes this out just about to June 1st; that's the time on this.

Having revoked probation and imposed a sentence, the Court also places Mr. Herrera on supervised release now on the 2011 case. He faces three years of supervised release. I impose three years of supervised release to begin when he's released from custody after serving his sentence for the breach of trust.

The two conditions of supervised release are that Mr. Herrera may not return to the United States. If he comes back, he's going to face more time in jail. And second, he may not violate any United States law. So on the old case, the 2011 case, three years' supervised release following serving 220 days subject to the credit that he already had accrued. Obviously any time he's been in custody will also count toward that 220 days, so from November 15 forward. By my math that gets us out to about May 31, real close to June 1st, before he completes that sentence, the unserved portion of it.

MS. JINDAL: I think -- so he would effectively have about 160 days by my --

THE COURT: Yeah, it's 153 is what my calculations were, net time.

MS. JINDAL: So 150 days from November 15 would be -- I have an app on my phone, your Honor -- is April 14. So he would have served 150 days by April, mid April.

THE COURT: Well, then my math is off on this. Let me do it again because -- maybe the easiest thing to do is to just to -- let's see -- it's between four and ten months. If I give him a eight-month sentence -- does your app tell us where that would put us, eight months from November 15? I mean June 1st is six months; from January 1st to June 1st is --

MS. JINDAL: So eight months --

THE COURT: Actually five months, right? January, February, March, April, May, so there's five months, call them 30 day months. That's 150 days just for that. Then he has another roughly 46 days. So that would be 196 days to get out to June 1st. And then if I add -- you said 72 days -- actually what was the pronounced sentence that I made? I come up with 168 days all together, but maybe -- I'm sorry, it's 268. That's where my math is wrong. So I'm two months shy. I'm sorry. I made a mathematical error. The sentence is 268 days. He'll get 72 days' credit, if you're right on your accounting, for the time that he had before he was put on probation, right? And then he's accumulated credits now since November 15 and today, which further takes it down, and it means he's got about two months left to serve; he's got April and May to serve on this sanction. So I apologize for the math error. I was doing it a little bit in my head. I've done it now on paper.

The sanction is 268 days, subject to those credits. So, Mr. Herrera, here's what you should understand. That sentence seems long; 268 days seems like a long time. Immediately you're going to get credit for the 70 days that you did, 72 days, back in 2011, so that comes off. Then you've been in custody since November; you're going to get credit for that too. What this means is that you have about two months left. Here we are on the 24th of March. You'd be in custody April and May, and then you'll be out around June 1st on this sentence. After you complete serving this sentence, you'll be on supervised release for three years, which means don't come back because you'll have to face additional time if you get caught back in the United States again.

Sentencing on the new case, Ms. Jindal, will be on Monday, the 1st of June at 9:30. You can file whatever you need. Does he waive his right to a presentence report?

MS. JINDAL: He does.

THE COURT: Okay. And I don't know how much work you need to do on the -- on the challenge to the prior because the Court, at this point at least, absent some aggravation, would be inclined to place him on five years' probation on the new case. I'm happy to hear from both sides. I assume that would be your recommendation anyway, something like no more time as of June 1st, right --

MS. JINDAL: Correct.

THE COURT: -- whether it's a probationary sentence or some other form of sentence. But -- and I'm inclined not to give him any more time. I mean this is a -- I won't say a significant increase, but it's an increase over the 70 days that he did before. So that's where I'm at.

So I'll see you on June 1st at 9:30 for sentencing on the new case. You have no objection to that, Ms. Jindal, putting the new case off until that day given the Court has now pronounced sentence on the -- or the probation violation?

MS. JINDAL: No, your Honor. I'm fine with that.

THE COURT: Okay. Anything else?

MR. KATZ: No, your Honor. Thank you.

THE DEFENDANT: Thank you.

MS. JINDAL: Actually I just thought of one final thing, your Honor.

THE COURT: Sure.

MS. JINDAL: It's a clerical issue. I don't think that we're going to end up needing this, but I notice this morning that the motion that was refiled after the Court struck the original motion to dismiss, the refiled motion to dismiss has a typo where it looks like Raya-Vaca was spelling -- auto-corrected to a different word.

THE COURT: Okay.

MS. JINDAL: What I would request is permission for me to file an amended version.

THE COURT: If you want to do that; you can interlineate it, or I'll note the correction at this --

MS. JINDAL: Okay. If your Honor's going to note it, then that should be good enough.

THE COURT: I do. I have it here, and I've spelled it already for the record, but it's R-a-y-a hyphen V-a-c-a, so -- okay. Look, I don't like it that you're in jail, I don't, I don't like it. You seem like a nice guy, you seem like a family man, but you're putting me in this position by keep coming back here without permission. You can't expect us just to ignore that. We have a border, and we have laws. So I feel bad that you're sitting in jail, and I feel bad that you're aside from your family, but -- is there a mirror in the cell where you're sitting? Is there a mirror there? Yes? Okay. When you go back -- when you go back this afternoon, you look in the mirror because the guy you see in the mirror is the guy who's going to be responsible for you being in jail, not me. I'm just reacting to it. It's the guy that made the decision to come back across after he promised me he wouldn't and knowing that it was wrong to come back across; that's the guy that's responsible. I'm sorry about that, and I wish you Godspeed. I hope it comes quickly that you come back and we get you back to your family and that you stay there in the future. Okay?

THE DEFENDANT: Thank you.

THE COURT: All right.

(The proceedings were concluded.)

Certificate of Reporter

I hereby certify that I am a duly appointed, qualified, and acting Official Court Reporter for the United States District Court; that the foregoing is a true and correct transcript of the proceedings had in the mentioned cause on the date or dates listed on the title page of the transcript; and that the format used herein complies with the rules and requirements of the United States Judicial Conference.

Dated July 2, 2015 at San Diego, California.

/s/ Debra M. Henson (electronic)
Debra M. Henson
Official Court Reporter